SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 109954/2010
CLINDININ, RONALD
vs.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 23, 2013

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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RONALD CLINDININ,

Plaintiff,

-against-

Index No. 109954/10

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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JOAN A. MADDEN, J.:

In this action, plaintiff, Ronald Clindinin, seeks damages for injuries he sustained when he was burned by hot water from the showerhead in the bathroom of his apartment in the building located at 868 Amsterdam Avenue in Manhattan (the Building). Plaintiff's landlord, the New York City Housing Authority (NYCHA), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiff opposes the motion, which is denied for the reasons below.

Background

Plaintiff alleges that on September 18, 2009, he sustained scalding injuries due to the defective nature of the Building's hot water boiler/system, in that the water flowing into his bathtub was excessively erratic, hot, scalding, gave off steam, and changed from cold and cool to scalding hot. In the bill of particulars, plaintiff alleges that NYCHA was negligent in, among other things, the operation, maintenance, inspection and repair of the Building's hot water boiler and system. Specifically, plaintiff alleges that NYCHA was negligent in delivering shower water that was erratic in temperature, shifting to excessively hot, and that the water temperature could

not be adequately and reasonably controlled and set with the temperature control lever (the lever). Plaintiff further alleges that NYCHA failed to install an anti-scalding device and to maintain the Building's hot water system in a reasonably safe condition, and that the system lacked a required temperature relief valve. Plaintiff asserts that NYCHA violated section 78 of the Multiple Dwelling Law and sections 27-127 and 27-128 of the Administrative Code of the City of New York (Administrative Code) and Reference Standard (RS) 16, P107.26 (b), which is incorporated by reference into the Administrative Code by sections 27–897 and 27–901.

At his deposition, plaintiff testified that he awoke at approximately 4:45 to 5:00 a.m., closer to 5 a.m. (*id.*, exh. D, at 145), and attended to personal hygiene at the bathroom sink, which he estimated took 10 to 15 minutes. Planning a shower, plaintiff testified that he sat on the side of the bathtub, legs outside, and turned on the bathtub faucet with the lever. Plaintiff stated that he turned on the water, with the lever in the middle, which should have yielded lukewarm water, but that the water was steaming (*id.* at 139). Plaintiff further stated that he attempted to adjust the water temperature several times, turning the lever in the direction that would add additional cold water to the mix, and allowing time for the temperature to adjust. Plaintiff testified that he then used his hand to test the temperature, which "felt like it was okay" (*id.* at 141-142). Plaintiff then put in a little more cold water and waited a few more seconds.

Plaintiff testified that when he was satisfied with the temperature, in order to divert the flow of water to the showerhead, he pulled a knob on top of the faucet. Plaintiff recalled that water from the showerhead then touched his body, and was not the same temperature as it had been at the faucet (*id.* at 142), but a little bit warmer (*id.* at 144), and he moved back. After his deposition, plaintiff corrected his earlier testimony, by stating that "the water came [out] of the

shower burning hot as I testified elsewhere in the deposition" (*id.*, Errata Sheet at 1).[1]

Plaintiff testified that, despite having adjusted the lever for a cooler water temperature, the water was so hot coming out of the showerhead that, although he was not in contact with the water for more than a second, plaintiff reflexively jumped or jerked back, hitting the shower doors, which propelled him back into the bathtub. Plaintiff stated that the last thing that he recalled of the bathroom incident before losing consciousness was "that water, very, very, very burning hot on me" (*id.* at 241), and that he did not know the water's temperature, but that "it burned" (*id.* at 243). Plaintiff's next recollection of the incident was of being in the hospital.

The ambulance report reveals that the ambulance was dispatched at 5:36 a.m., and that plaintiff was thereafter transported to Harlem Hospital (NYCHA mov. aff., exh. G). Plaintiff asserts that he was diagnosed with second and third-degree burns over 13% of his body.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon the movant's proffer of evidence eliminating material facts in dispute, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [citation and quotation marks omitted]). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*id.* at 544). "If there is any doubt as to the existence of

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[1] Plaintiff corrected his testimony stating that "[t]he confusion was it only felt a little bit warmer for a fraction of a second but that for about a second gushed out very hot causing me to back up" (Brown mov. aff., exh. D, Errata Sheet at 1).

a triable issue, the motion should be denied" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]).

In moving for summary judgment, defendant argues: (1) that there is no competent proof of any defective condition concerning the hot water supplied to plaintiff's apartment; and (2) that defendant had no actual or constructive notice of the defective condition that plaintiff alleges.

A landlord may be held liable for injuries resulting from dangerous conditions on its property only where it created the condition or had actual or constructive notice of the condition (*Trujillo v Riverbay Corp.*, 153 AD2d 793, 794 [1st Dept 1989]), and must have notice of the specific condition at issue (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

> "Constructive notice ordinarily means that a person should be held to have knowledge of a certain fact because he knows other facts from which it is concluded that he actually knew, or ought to have known, the fact in question. Constructive notice also exists whenever it is shown that reasonable diligence would have produced actual notice"

(*Bierzynski v New York Cent..R.R. Co.*, 31 AD2d 294, 297 [4th Dept 1969] [citation and quotation marks omitted]). "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 defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

To meet their burden of demonstrating that it lacked notice of any problem with the hot water at the Building, NYCHA submits the affidavit of Building superintendent who states that any tenant complaints regarding hot water would generate the production of a work ticket and that there were no work tickets showing tenant complaints about excessively hot, erratic or fluctuating hot water temperatures in the year before the incident. Plaintiff, however, controverts this

showing based on his own testimony and that of two other tenants, Mr. Rodney Carter and Ms. Gwendolyn Branch, who claim to have complained to NYCHA agents about a too hot water/erratic hot water condition.[2]

For instance, Mr. Carter testified that, in the two years prior to 2009, he had made 10-20 complaints to NYCHA building employees about the water being either too hot or erratically changing its temperature. NYCHA's argument that Mr. Carter did not complain of the specific defect complained of by plaintiff, because his complaints did not concern plaintiff's apartment, is unpersuasive on this record. NYCHA has not demonstrated that the existence of this type of water condition in another apartment, that is in the same line as plaintiff's apartment, would not be probative of the condition of a water system that services all of the Building's apartments.

NYCHA also argues that plaintiff's deposition testimony, that he complained about the water during NYCHA's annual inspection, should be disregarded as contradictory to plaintiff's sworn testimony, at a General Municipal Law § 50-H (50-H) hearing, that he did not complain to NYCHA. In support, NYCHA provides authority for the well-known proposition that a party will not be permitted to submit an affidavit that contradicts prior deposition testimony to avoid summary judgment (*see Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]). However, plaintiff did not submit an opposition affidavit, and the First Department has stated that discrepancies in sworn testimony "raise credibility issues for the trier of fact" (*Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]; *Francis v New York City Tr. Auth.*, 295 AD2d 164, 164-

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[2] Plaintiff asserts that building tenant Kia Yates's testimony about hot water problems may be dispositive concerning notice to NYCHA because Ms. Yates testified that she was employed by NYCHA, but cites to no authority demonstrating that agency law principles would impute Ms. Yate's knowledge to NYCHA where her testimony reveals that her scope of assigned duties for NYCHA did not involve the Building at issue here.

165 [1st Dept 2002] [deposition testimony inconsistencies with earlier 50-h testimony raised fact issue]; *see Ebasco Constructors v Atena Ins. Co.*, 260 AD2d 287, 291 [1st Dept 1999] ["[c]redibility is generally not relevant in determining a motion for summary judgment"]; *see also Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [1st Dept 2002] [improper to resolve credibility issue on summary judgment where "contradictions . . . emerged as the result of plaintiff's elaboration on her testimony at the section 50–h hearing [which] only serve to undermine the plausibility of her account. Any inconsistencies . . . go to the weight of the evidence . . . and the value to be accorded to the evidence" is a fact issue for trial]).[3] That Ms. Branch later provided a contradictory affidavit also raises a credibility issue for trial.

NYCHA seeks to preclude plaintiff from offering the statements of nonparty notice witnesses who did not show up when subpoenaed by NYCHA, but provides no evidence that these witnesses were under plaintiff's control. Therefore, assuming, *arguendo*, that preclusion were available as a remedy, it is not properly imposed here.[4]

NYCHA also argues that summary judgment is warranted because there is no competent evidence of a defective condition with the Building or plaintiff's apartment's water system or that the water in plaintiff's bathroom was excessively hot. NYCHA asserts that water was supplied to

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[3] Defendant argues that plaintiff's testimony that he measured the water temperature at 140 to 150 degrees F prior to the incident must be disregarded because at his 50-H hearing, plaintiff testified that he had not measured the temperature of the water prior to the incident (Brown mov. aff., exh. E at 84). This is also a credibility determination for trial.

[4]However, the court agrees with NYCHA that tenant Helen Rivera's complaint to NYCHA in 1998-2000 was too remote in time to serve as notice (*see LaTronica v F.N.G. Realty Corp.*, 47 AD3d 550, 551 [1st Dept 2008] [housing violation notices dated 9-15 years before incident too remote to raise a fact issue]).

the apartment at a temperature that is not prohibited by law, and that plaintiff's injury was the result of his loss of consciousness, after failing to take prescribed medication to prevent seizures, which rendered him unable to monitor and adjust the hot and cold water mixture.

In support of its position, NYCHA provides the affidavit of engineer Leonard Weiss, PE, who opines that, based on his review of the evidence, the Building's water system was in appropriate working order. In this connection, Mr. Weiss points to the testimony of NYCHA's advanced heating plant technician, Mr. Nelson Thorpe, that NYCHA records reveal that the Building's hot water temperature was recorded in the boiler room at 120 degrees Fahrenheit (F) at 3:25 p.m. and 6:45 p.m. on the day before and at 6 a.m. on the day of the incident. Mr. Weiss states that such reports show that the boiler and hot water system functioned in a normal and consistent manner from September 13, 2009, through the morning of September 18, 2009, with hot water temperature of between 120-130 degrees F, which, he states, is within acceptable limits.

Mr. Weiss also avers, and it is undisputed, that Administrative Code § 27-2031 requires that every bath, shower and sink in a dwelling unit in a multiple dwelling be supplied with hot water at a constant minimum temperature of 120 degrees F at all times between the hours of six a.m. and midnight, but that there is no applicable code or statutory provision regulating maximum hot water temperature.[5] Mr. Weiss opines that hot water in excess of 120 degrees F is needed for

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[5]Administrative Code § 27-2031, "Supply of hot water; when required" provides that:

> "Except as otherwise provided in this article, every bath, shower . . . and sink in any dwelling unit in a multiple dwelling . . . shall be supplied at all times between the hours of six a.m. and midnight with hot water at a constant minimum temperature of one hundred twenty degrees Fahrenheit from a central source of supply constructed in accordance with the provisions of the building code and the regulations of the department, provided however that baths and showers equipped with balanced-pressure mixing valves, thermostatic mixing valves or combination

performing certain household tasks and to kill harmful microorganisms, with the individual using the water expected to use the controls to mix hot and cold water to reach the desired temperature. Mr. Weiss opines that 150 degrees F is a commonly employed domestic hot water temperature that does not violate any known code or statute. He states that as water travels from a building's hot water storage tank it cools and, in order to account for the loss of heat in travel to the most distant apartments, it is normal and acceptable practice to send water from the boiler room in excess of 120 degrees F, so that the landlord can comply with its obligation to provide a constant flow of hot water to each apartment at the statutory minimum temperature.

NYCHA also provides the expert opinion of Dr. Robert D. Goldstein, who concludes, to a reasonable degree of medical certainty, that plaintiff's injuries may have been caused by exposure to water temperature of 120 degrees F or less. Dr. Goldstein explains that how quickly an individual's skin will sustain injuries from hot water is primarily dependent upon skin thickness, water temperature and length of exposure, and refers to a Consumer Product Safety Commission (CPSC) publication which indicates that most adults will sustain third-degree burns after five minutes of exposure to 120 degree F water. Dr. Goldstein also discusses a journal article which he asserts states that a 10-minute exposure to 118.4 degree F water causes a first degree burn, and a 14-minute exposure second and third-degree burns. Dr. Goldstein states that he has been advised that the record testimony indicates that plaintiff may have been exposed to water in the shower for 15 minutes or more.

> pressure balancing/thermostatic valves may produce a discharge temperature less than one hundred twenty degrees Fahrenheit but in no event less than one hundred ten degrees Fahrenheit."

In addition, NYCHA points to plaintiff's 50-H hearing testimony that he did not know the temperature of the water flowing from the showerhead when he was burned, and challenges the qualifications and methodologies of plaintiff's expert and others witnesses, as well as the basis supporting their conclusions.[6] NYCHA also argues that plaintiff's investigator, Mr. Daniel Levine, who measured the bathroom water temperature at 150 and 150.4 degrees F on October 30, 2009, 42 days after incident, is not probative of the water temperature on the accident date, and that Mr. Levine failed to examine the Building's boiler room or look at records pertaining to the Building or plaintiff's apartment, and was not qualified to take the temperature of the water.

In opposition, plaintiff argues that NYCHA failed to establish its burden on the motion and that there are triable fact issues concerning the condition of the hot water system, relying on plaintiff's deposition testimony that in 2008 he measured the temperature of the hot water flowing from his tub faucet, which ranged from 140 to 150 degrees F.

Plaintiff also submits the affidavit of master plumber, Sylvan Tieger, who inspected the Building's hot water storage tank on April 21, 2011, and avers that he found it in poor condition, improperly maintained and unsafe. Mr. Tieger states that, in addition to producing hot water, boilers also produce much hotter water, used for heating, and that for this reason a mixing valve is required to reduce the temperature of the domestic water supply to a safe level, which is why the hot water heating unit and its components must be checked, inspected and maintained. He further

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[6]As to plaintiff's medical expert, Dr. Alan Zaccaria, NYCHA maintains that his expected conclusion, based on plaintiff's CPLR 3101 (d) response, that plaintiff was burned because the water temperature was 150 degrees F, is faulty in failing to: (1) address the significance of the length hot water exposure in determining causation; (2) state what Dr. Zaccaria relied upon in forming his conclusion; or (3) cite to supporting medical or scientific authority. These arguments were obviously based on the expectation that Dr. Zaccaria would opine that plaintiff was exposed to water of 150 degrees F, but, as discussed below, Dr. Zaccaria did not assert this.

states that his inspection revealed that "the unit . . . was not properly maintained and thereby presented a risk to the tenants of being scalded" (Friedman opposition (op.) aff., exh. I, ¶ 2), and specifically that the aquastat showed signs of being tampered with, was set too high, and its temperature adjustment set screw was severely stripped. Mr. Tieger avers that during his inspection the water in the storage tank dropped approximately 20 degrees F in 22 minutes, that fluctuations of this magnitude can lead to scalding incidents and, based on the conditions of the tank and its components, concluded that "this type of water fluctuation was a longstanding, ongoing, and recurring problem" (*id.*, ¶ 4).

Mr. Tieger also avers that, "within a reasonable degree of Master Plumbing certainty at the time of the scalding incident . . . the circulator pump failed to respond to the Aquastat," resulting in excessively hot water flowing through the pipes and out of the tap. Mr. Tieger states that this is because when a circulator pump fails to respond to an aquastat, hot water rises in an uncontrolled manner through the piping system, bypassing the impeller and flow control valve, which regulate the natural stratification of hot water. Mr. Tieger states that as a result of the failure of the circulator pump on the date of the accident, dangerously hot water was permitted to flow directly into the domestic water supply and to come into contact with plaintiff.

Plaintiff provides evidence that NYCHA's records demonstrate that inspection of the boilers, approximately 13 hours before the incident, revealed that one of the boilers had been shut down and remained so at the time of the accident, and that NYCHA's heating technician, Mr. Thorpe testified that both boilers ordinarily worked together to heat water supplied to the water tank. Plaintiff notes when the boiler was inspected, at 12:25 p.m., on the date of the incident, the hot water tank temperature had dropped to 60 degrees F, and that Mr. Thorpe testified that the hot

water circulator pump/motor controls the hot water going to the Building's tenants and that it had broken down. In addition, plaintiff submits the affidavit of Dr. Alan Zaccaria, a board-certified plastic surgeon (Friedman op. aff., exh. C), who opines that the extensive nature of plaintiff's burns and the amount of surgery needed to treat them indicate that the injury was, within a reasonable degree of medical certainty, caused by excessively hot tap water.[7]

The elements of a negligence case are (1) a duty of reasonable care owed by a defendant to a plaintiff; (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). A real property owner owes a duty to maintain the property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *Golden v Manhasset Condominium,* 2 AD3d 345, 346 [1st Dept 2003]; *see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990] ["The owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition"]; *see also Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995] [landlord's "alleged compliance with the applicable statutes and regulations is not dispositive of the question of whether it satisfied its duties under the common law"]). Furthermore, "[s]ection 78 (1) of the Multiple Dwelling Law requires the owners of multiple dwellings to keep their premises in 'good repair,' and section 77 (4) of the same statute specifically requires that plumbing and drainage system be maintained in 'good repair'" (*Carlos v 395 E 151st Street, LLC,* 41 AD3d 193, 195 [1st Dept 2007]).

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[7] As plaintiff has not demonstrated that the CPSC advisory he submits is intended for large multiple dwellings, as opposed to single-family homes, or how it comports with Administrative Code § 27-2031's requirements, his assertion that the court may take judicial notice of the advisory is unpersuasive (*see* CPLR 4511[b] [a party seeking to have the court take judicial notice should provide the court with sufficient information to permit the court to take judicial notice]). In any event, Mr. Thorpe testified that the NYCHA's records show that the water heater was set at 120 degrees, which comports with the advisory.

Plaintiff argues that NYCHA failed to met its burden because it has not sufficiently demonstrated that the condition of the hot water system was not dangerous at the time of plaintiff's accident. NYCHA has presented evidence that the hot water heater was set at 120 degrees F, and that the water temperature in the tank was 120 degrees F the evening before and the morning of plaintiff's accident, and that water leaving the tank to travel through the Building would cool somewhat in transit. This is proof that NYCHA meets Administrative Code § 27-2031's temperature requirements and, of course, it is not negligent for a landlord to provide hot water of that temperature (*Williams v Jeffmar Mgt. Corp.* (31 AD3d 344, 346 [1st Dept 2006]). In addition, Mr. Thorpe testified that his review of the NYCHA records for the date of the incident, and four days before, did not reveal service issues with the boiler/hot water tank.

While NYCHA demonstrated that the water temperature at the hot water tank may have been suitable soon after the incident, plaintiff alleges that he was injured, and NYCHA was negligent, because the water in his shower was erratic in temperature, shifting to excessively hot, and could not be adequately and reasonably controlled and set by plaintiff using the lever intended for temperature control.[8] NYCHA acknowledges that plaintiff's complaint is about the sudden change in water temperature (NYCHA mov. memorandum of law at 15), and plaintiff testified, at his 50-H hearing, that the water temperature was cool at the tub faucet (Brown mov. aff., exh. E,

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[8] Plaintiff does not oppose NYCHA's contention that Mr. Thorpe's testimony sufficiently demonstrated that there was no violation of RS 16, P107.26. Sub-section (i) of RS P107.6 (Water Supply Control Valves), requires that a water temperature control valve in a shower "be equipped with high-limit stops adjusted to a maximum hot water setting of 120 [F]." While Mr. Weiss states that it is his opinion that the operation and maintenance of the domestic hot water system, including the hot water system with respect to the shower in plaintiff's apartment, was in conformity with applicable codes and standards on the date of the incident, he did not specifically address RS P107.6. NYCHA notes that plaintiff did not assert a violation of this provision, but plaintiff did allege that NYCHA failed to install an anti-scalding device.

at 80-81). Yet plaintiff suffered severe burns. NYCHA offers that adults will suffer serious, third-degree, burns in five minutes when the water is 120 degrees F, but does not adequately address plaintiff's contention of a water temperature change from cool to scalding.

NYCHA also does not demonstrate that Mr. Thorpe's reading of the NYCHA boiler room records demonstrates that the water system was working in a manner that would not have caused such a significant shift,[9] or that these records would address that issue, and therefore do not sufficiently eliminate material facts about this issue. Regarding the condition of the water system, at his inspection of plaintiff's bathroom, Mr. Weiss recorded the water temperature at 141 degrees F, and although the temperature did not significantly fluctuate for 15 minutes after he mixed it to a cooler temperature and ran the shower, Mr. Weiss does not demonstrate how this, or any other evidence, demonstrates that there was no defective condition with erratic water temperature on the date of the incident or demonstrate that his inspection, 17 months after the incident, is probative of this issue (*Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307, 307 [1st Dept 2005] ["expert's affidavit describing . . . bathroom over two years after the accident is not probative of its state on the accident date"]).

Mr. Weiss also asserts that he based his opinion concerning the acceptability of the water system to and in the bathroom on his review of the boiler room log records and Mr. Thorpe's testimony that the water system in the bathroom was functioning. However, Mr. Thorpe did not testify as to the condition of the water system to and in the bathroom, and Mr. Weiss does not

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[9] Plaintiff argues that Mr. Weiss fails to eliminate fact issues because he does not assert that 150 degrees F is appropriate for bathing or demonstrate that a hot water system delivering water at this temperature is not defective or dangerous.

discuss what in the boiler room records addresses the issue of erratic or fluctuating temperature.[10] Therefore, on this record, the court cannot conclude that NYCHA has eliminated all material issues of fact as to the condition of the Building's hot water system when the accident occurred.

In support of its motion, NYCHA relies heavily on *Williams* (31 AD3d 344), in which the Court determined that the evidence that a hot water mixing valve was set at 140 degrees F, with water temperature sometimes ranging above that setting, did not establish a breach of the landlord's duty of care to keep premises safe. The Court reasoned that a building's maximum hot water is not intended to be at a temperature appropriate for bathing, that people can control the water's temperature by mixing hot and cold, and need to do so in order to achieve a desired temperature (*id.* at 347). That there is a need to do so is clear, where, as both parties contend, the 120 degrees F statutory minimum may cause serious burns to adults in only five minutes.[11] *Williams,* however, does not directly address the situation alleged here, of an erratic, apparently extreme, temperature shift occurring after the alleged adequate mixing of hot and cold water by the user.

This case is factually closer to *Scholtz v Catholic Health Sys. of Long Is., Inc.* (70 AD3d 808, 808 [2d Dept 2010]), where the plaintiff alleged scalding from a sudden shift in the temperature of running water, and the court found triable issues of fact as to whether defendant

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[10]NYCHA complains that Mr. Levine does not state that he looked at the apartment records, but NYCHA's witness, Mr. Weiss, also does not indicate that he did so.

[11] Plaintiff argues that "residential real property owners as part of their duty to maintain their premises in a safe condition, have a duty to ensure that the water supplied to residents in their buildings is at a temperature level that will not cause burns" (Friedman op. aff., ¶ 55), but the cases to which plaintiff cites do not stand for this proposition, and plaintiff does not address how water of the required statutory temperature does not carry the potential to cause burns.

landlord properly maintained hot water system (*see also Shkolnik v Longo*, 63 AD3d 819, 819 [2d Dept 2009] [sudden change in water temperature allegedly causing injury]). The nature of water delivery to large apartment buildings may necessitate that tenants endure some temperature fluctuation after setting the water temperature. However, based on plaintiff's testimony concerning his conduct in mixing the hot and cold water, a significant sudden change in temperature thereafter, from cool to extremely hot, may constitute an unsafe condition.

In addition to plaintiff's testimony, Mr. Tieger's affidavit also presents a fact issue as to whether or not the broken circulator pump caused hot water to travel to plaintiff's apartment. Defendant argues that Mr. Tieger's affidavit should be disregarded because his inspection and testing were done 19 months after the accident. Certain of Mr. Tieger's assertions, such as about the temperature at which the water was set, may not be deemed probative of the condition of the boiler/water tank when the incident occurred, and have been disregarded here (*see Machado,*20 AD3d at 307). However, "[a]n expert's evidence must be based on facts in the record or personally known to the witness" (*Oboler v City of New York*, 31 AD3d 308, 308 [1st Dept 2006] [internal quotation marks and citations omitted], *affd* 8 NY3d 888 [2002]). There is record evidence that the circulating pump malfunctioned. That NYCHA records demonstrate that the circulator pump was discovered to be broken only later in the day, after the incident occurred, merely raises a fact issue as to its condition, as does Mr. Thorpe's testimony that the failure of the circulation pump results in lower water temperatures to tenants.

NYCHA contends that Mr. Tieger is not qualified as an expert because he is a plumber and not an engineer. "An expert is qualified to proffer an opinion if he or she possesses the requisite skill, training, education, knowledge, or experience to render a reliable opinion" (*de*

Hernandez v Lutheran Med. Ctr., 46 AD3d 517, 518 [2d Dept 2007]), and his or her competence "in a particular subject may derive from long observation and real world experience, and is not dependent upon formal training or attainment of an academic degree in the subject" (*Riccio v NHT Owners, LLC*, 79 AD3d 998, 1000 [2d Dept 2010] [internal quotation marks and citations omitted]). The court has the discretion to qualify an expert, and this determination will not be disturbed absent serious mistake, error of law, or the improvident exercise of discretion (*de Hernandez,* 46 AD3d at 517-518; *Oboler*, 31 AD3d at 308). Mr. Tieger's resume reflects that he has had some instruction and certification concerning boiler systems, and therefore he will not be disqualified on this record. Further review of his qualifications may be made at trial, where he can be questioned about his background and experience. After hearing the pertinent testimony, a further determination may be made.

NYCHA offers Mr. Weiss's opinion that Mr. Levine was not qualified to measure the water temperature and that his methodology was faulty because did not use a reference thermometer. The court declines to determine, on this record, as a matter of law, that, as he is a layperson without training, Mr. Levine was unqualified to correctly use a thermometer, or did not do so. As this opinion does not depend on that measurement, it is unnecessary to reach NYCHA's argument that Mr. Levine's measurement is invalid because it was taken 42 days after the accident.

Finally, plaintiff disputes NYCHA's contention that he suffered a seizure because he failed to take his medication, which rendered him unable to adjust and monitor the hot water in the shower. To the extent that NYCHA is raising the issue of whether plaintiff's conduct constitutes a superseding causation, this issue is generally one of fact for a jury to resolve

(*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). In any event, while plaintiff's testimony is unclear, he stated that he took medication, as prescribed, on the day before the incident (Brown mov. aff., exh. D, at 73-74). That he had not done so on the day of the incident, at approximately 5 a.m., alone, does not establish, as a matter of law, that plaintiff was the superseding cause of his injury. NYCHA neither demonstrates that plaintiff was required to take his medication that early nor submits evidence the failure to do so caused a loss of consciousness.

Accordingly, NYCHA is not entitled to summary judgment.

Conclusion

Therefore, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: July 23 2013

J.S.C.