SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

982

CA 15-00244

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

SCOTT BOWMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEANETTE E. ZUMPANO, JOHN S. ZUMPANO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered September 11, 2014. The order granted the motion of defendants Jeanette E. Zumpano and John S. Zumpano for summary judgment and dismissed the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendants Jeanette E. Zumpano and John S. Zumpano is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint as a child. The exposure allegedly occurred when plaintiff resided in an apartment (hereafter, premises) rented by his mother from defendants-respondents (defendants). Plaintiff asserted as a first cause of action that defendants were negligent in their ownership and maintenance of the premises and, as a second cause of action, that defendants were negligent in the abatement of the lead paint hazard. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint against them.

As a preliminary matter, we note that the court erred in conducting a separate analysis for each of the two defendants inasmuch as defendants purchased the premises during their marriage and are co-owners thereof (*cf. Turner v Davis*, 105 AD3d 946, 948), and we determine the issues on appeal from that perspective. With respect to the first cause of action, we conclude that, even assuming, arguendo, defendants met their initial burden of establishing as a matter of law that they lacked constructive notice of a lead paint hazard at the

premises, plaintiff raised triable issues of fact. Specifically, "plaintiff submitted evidence from which it may be inferred that defendant[s] knew that paint was peeling on the premises" (*Jackson v Vatter*, 121 AD3d 1588, 1589), and "evidence from which a jury could infer that [defendants] knew or should have known of the dangers of lead paint to children" (*Abreu v Huang*, 298 AD2d 471, 472; *see Jackson v Brown*, 26 AD3d 804, 805). With respect to the second cause of action, we likewise conclude that, even assuming, arguendo, defendants established their entitlement to judgment as a matter of law dismissing that cause of action, "the evidence submitted by plaintiff raised triable issues of fact whether defendant[s] took reasonable measures to abate the lead paint hazard after they received actual notice thereof" (*Pagan v Rafter*, 107 AD3d 1505, 1506-1507).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court