

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA PART 18
Justice

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: Index
DARRELL O'NEAL,etc., et al. : Number 4143 1998
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: Motion
- against - : Date October 16, 2002
:
NEW YORK CITY HOUSING AUTHORITY : Motion
: Cal. Number 28
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The following papers numbered 1 to 16 read on this motion by defendant New York City Housing Authority for summary judgment dismissing the complaint against it and on this cross motion by the plaintiffs for summary judgment on the issue of liability.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits ...	5 - 8
Answering Affidavits - Exhibits	9 - 13
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Other (Memorandum of Law).....	16

Upon the foregoing papers it is ordered that:

That branch of the motion by the defendant authority which is for summary judgment dismissing the third cause of action asserted against it is granted. That branch of the plaintiffs' cross motion which is for summary judgment on the issue of liability arising under the third cause of action asserted against the defendant authority is denied.

Those branches of the defendant authority's motion which are for summary judgment dismissing the first, second, and fourth causes of action asserted against it are denied. Those branches of the plaintiffs' cross motion which are for summary judgment on the issue of liability arising under the first, second, and fourth causes of action asserted against the defendant authority are

denied.

(See the accompanying memorandum.)

Dated: January 3, 2003

J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 18

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DARRELL O'NEAL, etc., et al.

INDEX NO.: 4143/98

BY: HART, J.

- against -

DATED: JANUARY 3, 2003

NEW YORK CITY HOUSING AUTHORITY
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Defendant New York City Housing Authority has moved for summary judgment dismissing the complaint against it. The plaintiffs have cross-moved for summary judgment on the issue of liability.

The infant plaintiff, Darrell O'Neal, born March 14, 1993, resided in Apartment 8G, 4020 Beach Channel Drive, Far Rockaway, New York, an apartment building owned by the defendant authority. The building had been completed in 1973. Plaintiff Relaya Howell, his mother, had moved into the premises in or about November, 1992. Although the apartment had been painted and re-

plastered at about that time, by 1996 plaintiff Howell allegedly had complained to the defendant authority that paint on the walls was peeling. The defendant authority allegedly told her that there was no painter available at the time. On the other hand, the defendant authority asserts that plaintiff Howell had made no complaints about the condition of the paint in her apartment until after her son tested positive for lead poisoning.

The plaintiffs allege that the apartment had peeling paint, paint chips, and dust with lead content. Plaintiff Howell had allegedly seen her son eating paint chips and plaster. On or about May 28, 1997, plaintiff Howell took her son for preschool testing and learned that he had an excessive blood lead level. Darrell received treatment for the condition as an in-patient at a hospital from May 30, 1997 to June 4, 1997, and, upon his discharge, he did not return to 4020 Beach Channel Drive, but went to live at his aunt's apartment in another building.

According to the defendant authority, the Department of Health ("DOH") conducted tests at the subject apartment on May 28, 1997 and June 3, 1997, which were negative. On the other hand, the plaintiffs contend that the inspection of May 28, 1997 obtained two positive readings, the first at the right casing of the bathroom door and the second at a bathroom pipe. On September 18, 1997, the DOH again tested the apartment and took one positive reading. On September 25, 1997, the DOH issued an Order to Abate Nuisance to

the defendant authority. The order reads in relevant part: "an inspection conducted by the Department of the dwelling unit on the above date [September 18, 1997] determined that the above dwelling unit contains lead based paint with a concentration of lead equal to or greater than 1.0 milligrams of lead per square centimeter, and which is peeling, and/or located on one or more window friction surfaces, or on another surface that the Department has determined to be a lead hazard because of its condition, location, or accessibility to children, in violation of New York City Health Code Section 173.13(d)(2)." On October 9, 1997, the DOH reinspected the subject apartment and subsequently wrote to the defendant authority stating that the violation had not been cured. On December 29, 1997, the defendant authority performed lead abatement work in the subject apartment. Subsequent testing showed negative results.

The defendant authority is entitled to summary judgment dismissing the third cause of action asserted against it. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) The third cause of action alleges that the defendant authority did not "immediately abate the dangerous lead condition" after DOH issued a violation. Since Darrell never returned to the apartment after his discharge from the hospital, the plaintiffs failed to raise a genuine issue of fact concerning whether the defendant authority did not diligently abate the hazardous condition, thereby causing the

infant plaintiff further injury.

Accordingly, that branch of the motion by the defendant authority which is for summary judgment dismissing the third cause of action asserted against it is granted. That branch of the plaintiffs' cross motion which is for summary judgment on the issue of liability arising under the third cause of action asserted against the defendant authority is denied.

In regard to the remaining causes of action asserted against the defendant authority, summary judgment is not warranted because there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.)

A landlord has a common-law duty to maintain his property in a reasonably safe condition. (See, Mejia v New York City Transit Authority, 291 AD2d 225.) A landlord is also under a statutory duty to ameliorate hazardous levels of lead based paint. (See former Administrative Code of the City of New York § 27-2013[h] [Local Laws, 1982, No. 1 of City of New York [Local Law 1] [now Administrative Code § 27-2056.1 et seq.]; Juarez v Wavecrest Management Team Ltd., 88 NY2d 628.) "Under Local Law 1, lead-based paint constitutes a hazard when two conditions are present: first, lead in an amount exceeding the stated threshold and second, a child six years of age or under residing in the apartment ***." (Juarez v Wavecrest Management Team Ltd., supra, 646.)

"In order to recover damages for an alleged breach of

this [common law] duty, the claimant must demonstrate that the landlord created, or had actual or constructive notice, of the hazardous condition which precipitated the injury ***." (Mejia v New York City Transit Authority, *supra*, 225; Perez v Bronx Park South Associates, 285 AD2d 402; Leo v Mt. St. Michael Academy, 272 AD2d 145.) Actual or constructive notice of the hazardous lead condition is also an element of liability arising under Local Law 1. "To be liable for injuries caused by the lead hazard, then, a landlord must have actual or constructive notice of both the hazardous lead condition and the residency of a child six years of age or younger." (Juarez v Wavecrest Management Team Ltd., *supra*, 646.)

Under all of the circumstances of this case, the plaintiffs failed to raise a genuine issue of fact pertaining to whether the defendant authority had actual notice that the paint used in their apartment contained a hazardous level of lead. The plaintiffs also failed to raise a genuine issue of fact pertaining to whether the defendant authority had constructive notice that the paint used in their apartment contained a hazardous level of lead. (Compare, Abreu v Huang, ___ AD2d ___, ___ NYS2d ___, 2001 WL 34036242 [NYAD 2 Dept]; Batts v Intrebor, Inc., ___ AD2d ___, 747 NYS2d 537.) In Chapman v Silber (97 NY2d 9), the Court of Appeals held that "absent controlling legislation, a triable issue of fact [pertaining to constructive notice of hazardous lead paint] is

raised when a plaintiff shows that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment." (Chapman v Silber, supra, 15.) In the case at bar, the plaintiffs cannot meet the second branch of this test because their apartment was constructed after the time that lead-based interior paint was banned.

However, a landlord is liable for a dangerous condition regardless of notice where he has created it (see, Mejia v New York City Transit Authority, supra), and, in the case at bar, there is an issue of fact pertaining to whether the defendant authority created the defective condition. The defendant authority owned the subject building from the time of its construction. The defendant authority had hired contractors to paint the plaintiffs' apartment. Although the defendant authority allegedly required its painting contractors to use only paint whose lead content was at a legal level and although the apartment was occupied by tenants who may have done painting themselves, nevertheless, the court cannot conclude here as a matter of law that the defendant authority has no responsibility for the excessive level of lead in the plaintiffs' apartment. "It is well settled that where the facts

permit conflicting inferences to be drawn, summary judgment must be denied***." (Morris v Lenox Hill Hospital, 232 AD2d 184, 185, affd 90 NY2d 953; Myers v Fir Cab Corp., 64 NY2d 806.) In the case at bar, the trier of fact must decide whether the painters hired by the defendant authority actually used proper paint and/or whether other tenants painted the apartment themselves using hazardous paint.

Accordingly, those branches of the defendant authority's motion which are for summary judgment dismissing the first, second, and fourth causes of action asserted against it are denied. Those branches of the plaintiffs' cross motion which are for summary judgment on the issue of liability arising under the first, second, and fourth causes of action asserted against the defendant authority are denied.

Short form order signed herewith.

J.S.C.