Serrata v Proto Realty Mgt. Corp.
2002 NY Slip Op 30183(U)
April 4, 2002
Supreme Court, New York County
Docket Number: 114241/96
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JOAN A. MADDEN PART 11
Justice

TOMMY SERRATA, an infant under the age of 14 years, by his parents and natural guardians, JUAN and ANNA SERRATA, WANNY SERRATA, an infant under the age of 14 years, by her parents and natural guardians, JUAN and ANNA SERRATA, and ANNA SERRATA, individually,

Plaintiffs,

INDEX NO. : 114241/96

- v -

PROTO REALTY MANAGEMENT CORPORATION AND SHD REALTY CORPORATION,

Defendants.

MADDEN, J.:

Defendants, Proto Realty Management Corporation ("Proto"), and SHD Realty Corporation ("SHD"), move to set aside the verdict in favor of the infant plaintiff, Tommy Serrata (Tommy), on the grounds that it is against the weight of the credible evidence, that the court erred in certain evidentiary rulings, and as to Proto, that it is not liable as it is an agent of a disclosed principle, SHD. In the alternative, defendants move to set aside the award of damages as excessive and for an order granting a new trial as to damages.

In this action, plaintiffs sue the defendants alleging they were negligent in failing to abate lead paint conditions in an apartment owned by SHD and managed by Proto in which Tommy resided. Plaintiffs allege Tommy sustained serious injuries as a result of his exposure to such lead paint. After the trial on liability and damages, the jury awarded total damages in the amount of $905,000 for the following; past pain and suffering, $15,000; future pain and suffering, $150,000 over 61 years; $150,000 for medical care over 50 years; $60,000 for counseling over 15 years; $30,000 for tutoring over 12 years; and $500,000 for impairment of earning capacity over 50 years.

At trial the evidence indicated that the subject apartment, number 24, at 581 W. 161st Street, New York, New York was leased to Rafeal Tejada ("Tejada") who resided in the apartment with his wife and sons, and who leased a room in it to the infant plaintiff's parents, Juan and Anna Serrata. Tommy resided in the apartment from approximately six months of age. In 1996, when he was two years old, Tommy's blood tests indicated elevated lead levels of 33 micrograms per deciliter.

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Subsequent to the test results, the Department of Health inspected the apartment and issued numerous violations. Proto received notice of the violations and hired a contractor, Lima, to perform lead abatement work in the apartment.

As to the conditions in the apartment, Anna and Juan Serrata testified at trial that there was peeling paint throughout it and that the superintendent at the time, Franklin Lora ("Lora"), was in the apartment frequently to make repairs, and, in fact, had installed window guards due to Tommy's age. The deposition testimony of Lora, read at trial, supported this testimony, indicating that he had been in the apartment on numerous occasions to make repairs and that the apartment was not in good condition, had peeling paint and needed painting. Lora testified that he told Guzman, the managing agent for Proto, of the presence of persons other than the Tejada's in the apartment, of the condition of the apartment, including the peeling paint. Lora also testified that Proto's employees in the office were aware Tommy lived in the apartment and of the conditions in it.

According to Guzman during the period in question, he was employed by Proto as the managing agent of the building. Guzman testified that his responsibilities included supervising the building, collecting rent, inspecting apartments and doing repairs, and that in course of performing these responsibilities, he would visit the building one to two times a week. He further testified that minor repairs would be done by the superintendent of the building, who was a Proto employee, and that the superintendent in 1993 and 1994 was an Antonio Pichardo, and that subsequent to Pichardo, Lora was hired as the superintendent. According to Guzman, major repairs would be hired out by Proto to one of its contractors and that painting an entire apartment was the type of work performed by such a contractor. Furthermore, Guzman testified that when Proto received the notice from the Department of Health regarding the violation based on lead paint in the apartment, Proto hired Lima to do the lead paint abatement.

For the reasons below, defendants' argument, that the verdict should be set aside as to Proto on the grounds that Proto operated as the agent for the owner, SHD, a disclosed principle, and, as an agent, it is not liable for any lead conditions that existed in the apartment, is without merit. Defendants claim that these grounds were raised as "[d]uring the trial of this action the defendants requested that liability be assessed separately by the jury as against Proto Management Corp., and said

application was denied by the Court. The Court further denied the defense request to have distinct interrogatories on the verdict sheet as to Proto Realty Management Corp., and as to SHD Realty Corp., respectively."

At the outset it is noted that throughout the trial the defendants were represented by the same counsel, and that the issue of Proto's lack of liability on the theory that it was an agent for SHD, was not specifically raised. However, at the precharge conference, defendants did request separate questions on the verdict sheet as to Proto and SHD. When questioned as to the basis of this request, the defendants responded "[w]ell, if the jury does not credit Lora's testimony they may find that maybe only the managing agent had notice, or they may find something else." The record indicates that the defense attorney later stated that the defendants "briefed the subject." The issue the defendants briefed during the trial sought "[a] declaration that knowledge by the superintendent on plaintiff's tenancy could not be imputed to the landlord because he had an 'adverse interest' to the defendants." According to the brief, the basis of the motion was an alleged relationship between Lora and the Tejada and Serrata families. In support of this, in their brief, defendants pointed to the deposition testimony of Anna Serrata that Juan and Lora spent time together outside the apartment[1] and the deposition testimony of Lora that he knew Tejada and Serrata from the Dominican Republic where he had seen each a few times. Defendants argued in their trial brief that this testimony established an "intimate relationship" between Serrata, Tejada and Lora and that from this "intimate relationship" it could be inferred that Lora was engaged in a scheme to defraud the building management for the benefit of the Serrata or Tejada families. Specifically defendants asserted that Lora knew, but failed to disclose the Serrata family's tenancy to the defendants, and therefore, Lora's knowledge of Tommy's presence could not be imputed to the defendants.

The brief did not raise any issue as to Proto's lack of liability based on the principle that it was an agent for a disclosed principle. While defendant attorney did seek separate questions on the verdict sheet as to Proto and SHD at the precharge conference, such request was based on the argument that if the jury did not find Lora credible, it may find only Proto, the managing agent, had

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[1]While defendants indicated that page 72 of Anna Serrata's deposition transcript (Exhibit C) contained such testimony, such page was not included.

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notice. Furthermore, defendants' proposed verdict sheet does not contain any question as to the issue of Proto's lack of liability as an agent for a disclosed principle. Thus, to this court, neither the trial brief, nor the request as articulated at the precharge conference adequately raises or preserves this issue. De Long v County of Erie, 60 NY2d 296, 306 (1983); Wallace v City of New York, 86 AD2d 510, 511 (1st Dept 1982).

In any event, even if this issue was properly raised and preserved, defendants' motion must be denied. Guzman's own testimony states that his responsibility as managing agent for premises included visiting the building , collecting rents, inspecting apartments and doing repairs. In addition, it is undisputed that there was a super who lived on the premises and who received an apartment and salary for his work. Both Lora and Guzman testified that the super was required to do minor repairs and Guzman testified that contractors were hired by Proto to do major work, such as painting an apartment. Defendants statements in their reply affirmation that "Proto's essential responsibility [was] to collect and manage the building rents" is flatly contracted by Guzman's testimony, which, as outlined above, clearly states that Proto's employees were responsible for operating and managing the premises. Furthermore, as to defendants' contention that SHD paid Lora, it is not supported by the evidence adduced at trial. Guzman testified that "we had a super on the premises", and, as it is undisputed that Guzman was employed by Proto, there is a clear inference that Proto employed the superintendent, or that the relationship between Proto and SHD was such, that the issue of who paid the superintendent is not significant.

Similarly, without support in the record is defendant's contention that larger complaints had to be reported by Proto to SHD so that it (Proto) could get authority from SHD to make necessary repairs. The evidence indicates that the super would report the need for such repairs to Proto's office, or to Guzman. There is no evidence in the record to support defendants' theory, first advanced in their reply affirmation, that the super and Proto were concurrent agents of SHD for different purposes.

Under applicable law, a managing agent may be held liable for nonfeasance only if it is it is in the complete and exclusive control of the management and operation of the building. German v Bronx United in Leveraging Dollars, Inc., 258 AD2d 251, 252 (1st Dept. 1999) citing, Ioannidou v Kingswood Mgt. Corp., 203 AD 248, 249 (2d Dept 1994); Keo v Kimball Brooklands Corp., 189 AD2d 679 (1st

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Dept 1993); Gardner v 111 Corp., 286 AD 110 (1st Dept 1955), aff'd 1 NY2d 758 (1956). The evidence in the instant case, amply supports the determination that Proto was in such control of the building. As indicated above, Proto hired the superintendent who was required to perform certain types of repairs to the apartments and who would notify Proto of the need for significant repairs. The evidence also establishes that Proto would hire a contractor to paint when an entire apartment needed repainting. Absent from the record is any evidence that anyone other than Proto performed any functions regarding the operation and management of the building. Thus, contrary to defendants' argument, plaintiff established that Proto's "managerial prerogatives were sufficiently encompassing to support the imposition of liability upon it" for the infant plaintiff's lead induced harm." German v Bronx United in Leveraging Dollars, Inc., 258 AD2d, at 252.

Significantly, Proto failed to produce evidence to establish that it was not in complete control of the building so as avoid liability. Defendants' arguments are not only without any evidentiary support, but directly conflict with the trial evidence from which it is clear that Proto's responsibilities included the operation and control of the building. Even if defendants' assertions, made for the first time in this post trial motion, that Proto did not have authority to order repairs of any import, but needed SHD's approval, were true, and had been presented at trial, such evidence would be insufficient to set aside the verdict.

Defendants' reliance on Paganuzzi v Primrose Management Co., 268 AD2d 213 (1st Dept. 2000) and on Crimmins v Handler & Co., 249 AD2d 89 (1st Dept. 1998) is misplaced. These cases involved DHCR decisions regarding rent overcharges for which the managing agents were not responsible. Similarly, their reliance on the unpublished decision Accosta v Ben David, Sup. Ct. N.Y., J. Friedman, J. April 6, 2001, in which Proto was a defendant, is unpersuasive. The decision in Accosta, at 3 states that, "Proto acted as the disclosed managing agent for a Receiver of Rents appointed by the New York County Supreme Court pursuant to the foreclosure proceeding then pending." The decision is devoid of any statement regarding the responsibility exercised by Proto in relationship to the premises in Accosta, and this court declines to accept Proto's unsupported allegations as to Proto's responsibilities in that case. Accordingly, defendants' motion that the verdict should be set aside as Proto was an agent for SHD, a disclosed principle, is denied.

Furthermore, defendants' argument that Lora's knowledge that Tommy was living in the apartment could not be imputed to SHD because Lora was not a credible witness and had an interest adverse to that of SHD, is without merit. Lora's credibility, like that of any other witness, was for the jury to determine. In addition, both Ana Serrata and Lora testified that Proto's employees in the office were aware of Tommy's presence. Defendants' contention that Lora shared "complicity in a scheme to defraud the landlord" in that he failed to disclose that the Serratas lived in a room in the Tejada apartment and, thus, defrauded SHD of rents, is without evidentiary foundation. "It is well settled law that the principal is bound by notice or by knowledge of his agent in all matters within the scope of his agency although in fact the information may never have been communicated to the principal." Farr v Newman, 14 NY2d 183 (1964). An exception to such imputation, delineated in Center v Hampton Affiliates, 66 NY2d 782, 784 (1985) is applicable where an agent "totally abandons his principal's interest and is acting entirely for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal." In the instant case, defendants failed to produce evidence that Lora was conflicted, and their bare conclusory statements are insufficient to establish adversity so as to negate the imputation of Lora's knowledge to Proto.

As to defendants' argument that there was insufficient notice of the hazardous lead paint condition in the apartment prior to the notice to abate, there was more than sufficient evidence that Proto had notice that there was peeling paint throughout the apartment. Lora and the Serrata's testified to the peeling paint conditions in the apartment and to Proto's knowledge of such conditions through Lora and its other employees. The defendants cannot avoid liability based on Guzman's testimony that he was aware that the apartments were to be painted every three years. Such testimony not only fails to establish the absence of peeling paint in the apartment, but is meaningless when considered together with Guzman's testimony that he could not remember when the apartment was last painted, and Proto's failure to maintain records regarding the painting of the apartments.

Similarly without merit is defendants' argument that the opinion of Dr. Rosen should have been struck as unreliable since he rejects various epidemiological studies on lead poisoning and that a letter should have been admitted which was allegedly signed by Dr. Rosen informing plaintiffs of

the possibility of a claim based on the infant plaintiff's elevated lead levels. Dr. Rosen testified that he is a board certified pediatrician and professor for over thirty years at the Albert Einstein College of Medicine, Montifiore Medical Center, and is the head of its Division of Environmental Science in the Department of Pediatrics where the work is focused on the identification, treatment and management of childhood lead poisoning. Dr. Rosen also chaired the Committee at the Center for Disease Control which drafted national standards regarding the definition of childhood lead poisoning.

"As a general rule the admissibility of expert testimony on a particular point is addressed to the discretion of the trial court." De Long v County of Erie, 60 NY2d, at 306 (citation omitted). Contrary to defendants' argument, Dr. Rosen's medical education, background, training, and studies, as well as work with children exposed to lead paint at Montifiore and his stewardship of the CDC Committee, render him uniquely qualified in this field. Nor does defendants' argument that Dr. Rosen's opinion that Tommy had no cognitive or physical problems prior to exposure to lead based paint was speculative as Tommy had to be resuscitated at birth require setting aside the verdict. The issue is properly one for cross examination and goes to the weight given to Dr. Rosen's testimony, not its admissibility. Finally, there is no merit to defendants' argument that the letter from Dr. Rosen to Juan and Ana Serrata advising them of the possibility of a claim should have been admitted.

Regarding the exclusion of the academic records of Tommy 's sister, Wanny, absent a casual connection between Wanny's academic performance and Tommy's cognitive deficits, the records were properly excluded and thus, such exclusion does not establish grounds for setting aside the verdict. Although Wanny was an infant plaintiff at the commencement of the action, her claims were dismissed as a result of defendants' summary judgment motion. Contrary to defendants' argument, although there was a waiver of Wanny's privacy privilege as to her academic records in connection with her causes of action, the waiver did not extend to the action on behalf of Tommy. See generally, Monica W. v Milevoi, 252 AD2d 260, 263 (!st Dept. 1999). Furthermore, when the compliant was dismissed as to Wanny, she was no longer a party, and her privilege reattached.

In any event, the evidence presented at trial failed to establish the materiality and relevancy of Wanny's academic records. See, Andon ex rel. Andon v 302 - 304 Mott Street Associates, 94 NY2d 740 (2000); Monica W. v Milevoi, supra. Defendants' contention that the academic records are

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material and relevant as Wanny's performance may demonstrate that Tommy's problems are genetic in origin is unsupported by the record, speculative, and subject to so many variables, that it raises more questions than it answers. See, Andon ex rel. Andon v 302 - 304 Mott Street Associates, 257 AD2d 37, 40, (1st Dept. 1999), aff'd 94 NY2d 740 (2000). Neither the testimony of defendants' psychologist expert, Dr Teresa Ingcagnoli, nor plaintiff's neuropsychologist and rehabilitation expert, Dr. Richard Schuster, established a sufficient casual connection to admit the records. Monica W. v Milevoi, supra. Dr. Schuster testified he based his evaluation of Tommy on the results of a standardized intelligence test he administered and the family environment, that is, the family's view regarding work, and educational motivation. While Dr, Schuster testified that he would consider the genetic background in terms of the levels of intelligence needed to do the type of skills his parents use, that about 50% variance of intellect is genetically based, and that how a sibling was doing would be a point of interest, none of these statements are sufficient to establish that Wanny's performance at school impacts on the issue of causality, that is, whether Tommy's developmental impairment and cognitive deficits are related to his ingestion of lead paint. Thus, Wanny's academic records were properly excluded from evidence.

Similarly without merit is defendants' argument that the verdict should be set aside as to damages as against the weight of the credible evidence. "When the weight of the evidence is the issue, a verdict for the plaintiff may not be disregarded unless the evidence so preponderates in favor of the defendant that it could not have been reached by any fair interpretation of the evidence." Moffat v Moffat, 86 AD2d 864 (2d Dept.), appeal dismissed 56 NY2d 768 (1982), aff'd 64 NY2d 875 (1984), quoting O"Boyle v Avis Rent-A-Car System, 78 AD2d 431, 439 (2d Dept. 1981); see also, Lolik v Big V Supermarkets, Inc., 86 NY2d 744, 746 (1995). "This does not involve a question of law, but rather a discretionary balancing of factors." Cohen v Hallmark Cards, 45 NY2d 493, 499 (1978).

Upon consideration of the evidence as to damages, this court concludes that the jury's awards do not deviate materially from what would be reasonable compensation. La Fontaine ex rel. Currie v Franzese, 282 AD2d 935, 939 (3d Dept. 2001). Dr. Rosen, as noted above, was uniquely qualified to testify to the medical impact of Tommy's exposure to lead between the ages of six months and two years; Dr. Richard Schuster, a psychologist and rehabilitation counselor, testified concerning the

significance of the results of the twelve part standardized test as to Tommy's mental capacity; Ms. Braun, Tommy's teacher testified as to his academic performance and abilities; and Dr. Les Seplaki, an economist testified as to the impact Tommy's injuries would have on his future earning capacity.

Dr. Rosen testified that Tommy sustained neurological deficits and brain damage as a result of his exposure to lead, including deficits in language, abstract thinking, memory, visual motor integration, fine motor skills, visual spatial perceptual skills and verbal reasoning. According to Dr. Rosen, the damage is permanent and as Tommy gets older, his deficits will become increasingly more severe, resulting in behavioral problems, difficulty in academic performance, social relationships and productivity at work. Furthermore, Dr. Rosen testified that due to his lead exposure, until he was 17, Tommy needs annual neurobehavioral cognitive testing which would cost between $1800 to $2300 and tutoring three times a week which would cost between $50 to $75 an hour. In addition, according to Dr. Rosen, Tommy needs psychological counseling and medical monitoring which would cost approximately $3,000 per year until he was 18, and thereafter, he needs medical monitoring for life, as he is at risk for developing kidney disease and hypertension at a cost between $4,500 to $5,000 annually.

Dr. Schuster based his evaluation of Tommy's medical and educational needs and the effect his deficits due to lead exposure would have on his earning capacity on a neuropsychological and vocational assessment. He testified that Tommy's verbal I.Q. was 58, which places him in the first percentile. As a result, Dr. Schuster testified that Tommy had difficulty learning and that he could not absorb information, and, as Tommy got older, he would be unable to perform higher cognitive thinking. In Dr. Schuster's opinion, Tommy sustained a 25% diminution in earning capacity and a 16 1/5% loss of future work-life participation. Defendants' argument that Dr. Schuster's testimony regarding Tommy's 25% diminution in earning capacity is speculative as it is based on comparing Tommy's average projected income had he not been impaired and his average projected income based on his impairment as opposed to using a starting salary is without merit as such method of calculation was implicitly accepted in La Fontaine ex rel. Currie v Franzese, 282 AD2d, at 940.

Ms Braun, Tommy's first grade teacher, supported Drs. Rosen's and Schuster's testimony

testifying that Tommy cannot read, write process information nor speak in full sentences. She also testified that his math skills were poor, and, that while he could do some simple addition he could not subtract and does not understand shapes. Tommy is classified as learning disabled and it was Ms. Braun's recommendation that he repeat first grade.

Based on Drs. Rosen's and Schuster's testimony, together with the testimony on Ms. Braun, the jury awards of $15,000 for past pain and suffering, $150,000 for future pain and suffering over 61 years, $150,00 for medical care over 50 years and $60,000 for counseling over 15 years is amply supported by the record.

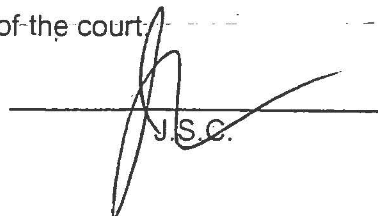
As to the $500,000 award for diminution of earning capacity, Dr. Les Seplaki, plaintiff's economist testified to Tommy's projected loss of income during his life based on income averages and used an annual growth rate of 4.22% which he indicated was based on long term growth statistics which he averaged based on historical increases in the hourly earnings and in historical increases in the consumer price index. Dr. Seplaki was questioned on his use of 4.22% rate and on defendants' claim that for the last 10 years the inflation rate was 2.8% . Not only was expert testimony proper in this area as such calculation is beyond the general knowledge of the average juror (De Long v County of Erie, 60 NY2d, at 306; La Fontaine ex rel. Currie v Franzese, 282 AD2d, at 940-941), but the significance of, and the weight to be given to, Dr. Seplaki's opinion was within the province of the jury. Syrkett v Burden, 176 AD2d 938, 939 (1st Dept 1991). In any event, Dr. Seplaki opined that Tommy's total loss of income over his life would be between $3 and $4 million and the jury awarded $500,000. Based on the testimony as to Tommy's cognitive deficits and anticipated behavioral problems and the difficulties these limitations present in a work environment, this award is supported by the evidence. La Fontaine, supra.

Accordingly, for the foregoing reasons, it is

ORDERED that defendants' motion is denied in all respects.

This constitutes the decision and order of the court.

DATED: April 4, 2002



J.S.C.