

**Santiago v New York City Board of Health and  
Department of Health**

2003 NY Slip Op 30168(U)

July 14, 2003

Supreme Court, New York County

Docket Number: 400095/96

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK  
Justice

PART 2

Santiago, Brenda

INDEX NO. 400095/96

- v -

MOTION DATE \_\_\_\_\_

NYC Bd of Health

MOTION SEQ. NO. 011

MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

SCANNED  
JUL 18 2003

Motion is decided in accordance with accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/14/03

Ley LOUIS B. YORK  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

Index No.: 400095/96

Part 2

BRENDA SANTIAGO, on behalf of her son  
ERIC GARCIA, and CHARISSE SCOTT, on  
behalf of her daughter SHAVONNE SCOTT,  
individually and on behalf of all  
children similarly situated,

Plaintiffs,

and MICHELLE GRAY, on behalf of her  
daughter AMANDA POPE, individually and  
on behalf of all children similarly  
situated,

Plaintiffs-Intervenors,

and DAVID NIEVES, on behalf of his son  
JORDAN NIEVES, ADALGISA POLANCO, on  
behalf of her sons, RAY MARTINEZ and  
STEVEN POLANCO, LINDA SMITH STEPHENS, on  
behalf of her son, ETIENNE STEPHENS, and  
GAYLE RASKIN, on behalf of her daughter  
KYLA RASKIN, individually and on behalf  
of all children similarly situated,

Proposed Plaintiffs-Intervenors,

- against -

NEW YORK CITY BOARD OF HEALTH AND  
DEPARTMENT OF HEALTH, through their  
Chairperson and Commissioner; NEW  
YORK CITY BOARD OF EDUCATION, through  
its President, and its CHANCELLOR; and  
NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY,

Defendants.

**DECISION/ORDER**

Present:  
Hon. Louis B. York  
Justice, Supreme Court

Defendants currently move for summary judgment as to the Raskin plaintiffs. Defendants urge dismissal on the ground that the Raskins' claims are barred by the doctrine of res judicata. According to defendants, the final judgment in a previous lawsuit involving the Raskins and the same defendants (hereinafter "Auclair"), is conclusive as to the claims alleged in the instant lawsuit (hereinafter "Santiago") because the instant claims are based on same transaction and could have been litigated in the previous lawsuit. Defendants raised the affirmative defense of res judicata in paragraph 112 of their amended answer to the amended second intervening class action complaint ("amended answer").

### Background

In 1997, the Raskins and others filed a personal injury claim in which the plaintiffs alleged that the exterior masonry work at New York Public School 61 (hereinafter "PS 61") was performed improperly, resulting in the dispersion of lead dust to the detriment of the plaintiffs and their children. Auclair v. New York City School Construction Auth., Index No. 117617/97. Based on the allegedly improper work performed at PS 61, the Raskins moved to intervene in Santiago. Other proposed plaintiffs also sought to intervene in this litigation. The Santiago plaintiffs seek declaratory and injunctive relief, and specifically do not seek damages for personal injury.

Meanwhile, the Auclair defendants moved for summary judgment. Justice Gangel-Jacobs, who presided over Auclair, held that because the Auclair plaintiffs could not show that any of the children attending PS 61 had elevated blood-levels sufficient to prove lead poisoning, their claims for lead poisoning and damages could not be sustained. Pursuant to her findings, Justice Gangel-Jacobs ultimately granted the defendant's motion and a final judgment was entered dismissing the lawsuit in December 1999. Auclair v. New York City School Construction Auth., Index No.

117617/97 (Sup. Ct. N.Y. County Dec. 28, 1999).

In 2000 this court granted the Raskins and the other proposed plaintiffs' motion to intervene in Santiago, a few months after final judgment had been entered in Auclair. In granting that motion, this court had no knowledge of the decision in Auclair or of its existence. The court permitted the proposed Plaintiffs intervention based on the parties' stipulation, dated July 6, 2000, which stated, inter alia, that:

2. Without prejudice to any positions defendants may assert in their motion to dismiss the Second Intervening Complaint, the defendants hereby consent to the intervention of the Second Intervening Plaintiffs [including the Raskins] . . .
3. Nothing herein, including but not limited to the fact that defendants consented to the intervention of the Second Intervening Plaintiffs, shall be used by the Second Intervening Plaintiffs in opposition to defendant's motion to dismiss the Second Intervening Complaint.

The parties explained that at the time of the proposed amendment, a motion to dismiss an earlier version of the complaint was already pending. The parties appear to have agreed to the stipulation because they wanted the court to consider defendants' arguments in their pending motion to dismiss in connection with the newly amended complaint. This, the parties explained, would be more efficient than having defendants withdraw the motion; having the parties then litigate the motion to amend; and then having defendants bring a new motion to dismiss that in many respects would reiterate the arguments set forth in the original motion.

In August 2001, this court granted defendants' motion to dismiss all plaintiffs except for Ms. Raskin on grounds that she was the only plaintiff with standing to sue the present defendants. Specifically, the court found that most of the plaintiffs and proposed intervening plaintiffs could not show injury in fact, which required either (1) a showing that lead paint or lead dust was present at the

facility in question or (2) a showing that the child on whose behalf the claim was asserted suffered from symptoms of lead poisoning or elevated blood lead levels. Gayle Raskin, on behalf of her daughter Kyla Raskin, had asserted that lead tests confirmed the presence of lead in and around PS 61 where her children attended kindergarten, and that defendants had notice of actual lead paint exposure. The court found that Raskin's allegations regarding the contaminated state of PS 61 was specific enough to satisfy the standing requirement of injury in fact; and that, therefore, Raskin retained standing to remain in Santiago.

In the present motion for summary judgment against the Raskin plaintiffs, defendants seek to dismiss the instant lawsuit based on the doctrine of res judicata. In its initial review of this motion, this court believed that in light of Auclair judgment, plaintiffs were collaterally estopped from relitigating the issue of the presence of lead paint and/or dust at the school. As the issue of standing is jurisdictional, the court could have addressed it sua sponte. Axelrod v. New York State Teachers' Retirement Syst., 154 A.D.2d 827, 828, 546 N.Y.S.2d 489,490 (3<sup>rd</sup> Dept. 1989); see Stark v. Goldberg, 297 A.D.2d 203,204,746 N.Y.S.2d 280,281 (1<sup>st</sup> Dept. Aug. 1,2002). However, rather than dismiss the case at that juncture, the court asked the parties to submit supplemental briefs on the subject of collateral estoppel. Now, in light of the motion papers as supplemented, the court denies defendants' motion for summary judgment.

#### Discussion

As plaintiffs correctly argue, the case at bar is much broader in scope than Auclair. In that action, plaintiffs, including the Raskin plaintiffs, alleged actual lead poisoning and emotional distress stemming from the existence of lead paint and/or dust at one institution, PS 61. On the other hand, the Santiago plaintiffs allege that lead paint and dust exist in specified types of facilities where

children receive care or education in New York City, such as schools, day care centers, Head Start centers; and, the plaintiffs purportedly represent all those children who have or may have been exposed to lead paint or dust in these facilities. In addition, here, plaintiffs seek declaratory and injunctive relief on the ground that defendants' failure to inspect and monitor these facilities for illegal lead contamination has resulted in increased danger of lead poisoning. In Santiago, PS 61 is only one of the schools at issue; its particular relevance is that plaintiffs have made a prima facie showing that there is lead paint at the facilities, and that this provides the Raskin plaintiffs with standing.

#### I. Collateral Estoppel

Under the doctrine of collateral estoppel, a party cannot relitigate "in a subsequent action . . . an issue clearly raised in a prior action or proceeding and decided against that party . . . if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." Sam v. Metro North Commuter Railroad, 287 A.D.2d 378, 379, 731 N.Y.S.2d 459,461 (1<sup>st</sup> Dept. 2001) (citations and internal quotation marks omitted). However, before a party can rely on the doctrine of collateral estoppel to prevent the relitigation of an issue, it must establish that "the precise issue was in fact litigated in the earlier action and would be decisive in the subsequent action" Patco Homes, Inc. v. Boyle, 260 A.D.2d 455,456, 688 N.Y.S.2d 193, 193 (2<sup>nd</sup> Dept. 1999)(citing David v. Biondo, 92 N.Y.2d 318,680 N.Y.S.2d 450 (1998)).

In its supplemental brief, plaintiffs have shown that, contrary to this court's initial conclusion, the court in Auclair did not resolve the issue of whether lead paint and/or dust was present at PS 61. Instead, the Auclair court stated that "the blood lead levels found in the children in

this case are defined as not elevated under Federal, State, and City statutes and regulations," and that there was no evidence that exposure to lead paint had so far had a negative impact on the children's growth or behavior. Auclair, at p. 5. The Auclair court dismissed the lead poisoning claim on the ground that the plaintiffs could not show any injury -- namely, that the plaintiffs could not prove these particular children had elevated lead levels in their blood. In addition, absent a showing of lead poisoning, the claim for negligent infliction of emotional distress required proof of the existence of a direct duty owed to plaintiffs; plaintiffs did not allege this duty, and therefore this other claim also failed. Because the court in Auclair dismissed on these bases, it did not reach the issue of whether the school itself was contaminated. See Parada v. City of New York, 283 A.D.2d 314, 316, 725 N.Y.S.2d 32, 35 (1<sup>st</sup> Dept. 2001).

Unlike Auclair,<sup>which</sup> was a personal injury action requiring the demonstration of injury from lead poisoning, the issue whether the plaintiffs actually sustained injury from lead poisoning is not dispositive here. Instead, the question of whether the school itself was contaminated is critical to the instant action. As the Auclair plaintiffs did not have a full and fair opportunity to litigate whether PS 61 was contaminated with lead, the Raskins are not precluded from relitigating it here. See Sam, 287 A.D.2d at 379, 731 N.Y.S.2d at 461. Thus, the Raskins retain standing based on their alleged injury in fact.

#### 11. Res Judicata

Defendant also challenges the lawsuit on res judicata grounds. Plaintiffs have raised several objections, which the court will address in turn.

Plaintiffs allege that defendants waived the right to the res judicata defense by not raising it at the earliest possible chance. According to CPLR § 3018(b), res judicata is an affirmative defense

and must be pleaded to not “take the adverse party by surprise or . . . raise issues of fact not appearing on the face of the prior pleading.” Id. Defendants filed their amended answer to the complaint in November 2001 - approximately 11 months after the dismissal of the Auclair action - and at this point defendants raised res judicata as a defense. Then, on December 20, 2001 - about 23 days after submitting the amended answer - defendants made this motion based on their affirmative defense.

The court finds that defendants did not unduly delay in raising res judicata. Between the dismissal of the Auclair action and the submission of their amended answer, defendants actively attempted to dismiss plaintiffs’ pleadings. Prior to November 2001, the parties spent years litigating the issue of whether plaintiffs’ amended complaint should be accepted by this court. Defendants only submitted their amended answer once the court dismissed the case as to all other plaintiffs but the Raskins in 2001; before then, they moved to dismiss in lieu of filing and serving the amended answer. Once the court issued an order allowing the relevant portion of the amended complaint to stand, defendants submitted the Amended Answer - which at that point, included the res judicata defense. Thus, despite the overt delay, defendants raised the defense as soon as they were required to submit the amended answer. It is even more appropriate to allow the assertion of the argument here, because when defendants answered the first complaint, plaintiffs involved in Auclair were not parties to this action; and, moreover, the Auclair action had not been dismissed. See Cowan v. Ernest Codelia, P.C., 149 F. Supp. 2d 67, 73-74 (S.D.N.Y. 2001).

Even if the court found that defendants had unnecessarily delayed in bringing the motion, this would not be a sufficient reason to disallow the defense. For, in addition to delay, there must be “significant prejudice to plaintiff.” Seda v. New York City Housing Auth., 181 A.D.2d 469,470,

581 N.Y.S.2d 469,469 (1<sup>st</sup> Dept. 1992), lv denied, 80 N.Y.2d 759 (1992). Prejudice can mean (1) the plaintiffs would have to expend significant additional resources in light of the proposed amendment; (2) the assertion of the argument would significantly delay resolution of the litigation; or (3) the assertion of the argument by the defendants would prevent the plaintiffs from bringing another, timely and proper, action. Monahan v. New York City Dept. of Corrections, 214 F.3d 275, 283-84 (2<sup>nd</sup> Cir. 2000), cert. denied, 531 U.S. 1035 (2000). Plaintiffs have not shown that they will be prejudiced in any of these respects.

In Seda, the First Department reversed the trial court, which had denied the defendant's motion to amend to include a defense based on the statute of limitations. Although the First Department agreed that the defendant's three-year delay was "inordinate," because of the absence of prejudice it held that the amendment should nonetheless have been allowed. Seda, 181 A.D.2d at 470, 581 N.Y.S.2d at 469. Similarly, here, plaintiffs have made no significant or persuasive argument regarding prejudice. See also Neulist v. Nassau County, 108 Misc. 2d 160, 163, 437 N.Y.S.2d 239,242, aff'd, 88 A.D.2d 587,450 N.Y.S.2d 762 (2<sup>nd</sup> Dept. 1982), lv denied, 57 N.Y.2d 606,455 N.Y.S.2d 1025 (1982)(though it was "unclear" why defendant waited over two-and-a-half years from dismissal of federal action to move for dismissal of state case, motion was granted because, inter alia, there was "no showing of prejudice" and plaintiff was already aware of relevant facts).

In addition, plaintiffs argue that the stipulations consenting to their intervention constitutes a waiver by defendants of res judicata and other arguments. However, the stipulation, which the court quotes above, see supra p. 3, specifically states that by consenting to the amendment, defendants did not waive any arguments they might later assert in a motion to dismiss. Under these circumstances,

defendants did not waive their right to seek dismissal. Cf. A. Colish, Inc. v. Abramson, 178 A.D.2d 252, 577 N.Y.S.2d 60 (1<sup>st</sup> Dept. 1991)(res judicata did not bar defendant's counterclaims where stipulation of discontinuance contained express reservation of rights). The court also notes that, in paragraph 3 of the stipulation, plaintiffs agreed that they would not argue waiver in opposition to a motion to dismiss.

Now, the court considers the substance of the res judicata argument. Res judicata precludes a party from asserting in a new action issues that were actually litigated and resolved in a prior proceeding. Siegel v. Competition Imports, Inc., 296 A.D.2d 540, 541, 745 N.Y.S.2d 701, 702 (2<sup>nd</sup> Dept. 2002). In addition, "res judicata embraces not only those matters which are actually litigated before a court but also those relevant issues which could have been litigated." In re Hoffman, 287 A.D.2d 119, 123, 733 N.Y.S.2d 168, 172 (1<sup>st</sup> Dept. 2001). Once a claim is finally concluded, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, N.Y.S.2d , (1981); see Saddle Brook Garden Restaurant, Inc., 299 A.D.2d 226, 749 N.Y.S.2d 412 (1<sup>st</sup> Dept. 2002).

According to defendants, the same transaction is the basis for both the Auclair case and the one at hand; thus, the court's inquiry must end and the case must be dismissed. However, the question of res judicata "actually involves two separate inquiries; what relief was indeed sought in the [other] action, and whether that relief could have been obtained [here]." Burka v. New York City Transit Auth., 32 F.3d 654, 657 (2<sup>nd</sup> Cir. 1994). After careful consideration of the facts at hand, the court concludes that res judicata is inapplicable. First, as explained above, in Auclair the plaintiffs sought money damages as compensation for personal injuries they allegedly sustained at a particular

location. This required a finding of elevated blood lead levels in the infant plaintiffs. Here, on the other hand, plaintiffs seek declaratory and injunctive relief in order to prevent the infant plaintiff and other children from suffering personal injuries. The injury to plaintiffs and to the class is prospective, based on the threat of imminent harm; and it does not require a finding that the children currently have elevated blood lead levels. Thus, the two cases are not "substantially identical" in form, substance, or the nature of the proof required. Young v. Williams, 810 F.2d 363, 365 (2<sup>nd</sup> Cir. 1987).

Second, after careful consideration, the court concludes that the plaintiffs in Auclair should not be barred from seeking the kind of broad-reaching injunctive relief that is the subject of the current litigation. If res judicata applied, this would mean that anyone who has ever sued over harm sustained by lead poisoning is barred from participating in a class action to enjoin future violations of their rights. However, it would be difficult for an individual to establish standing absent present or imminent injury; for, absent such injury, it is unlikely that a parent would have conducted lead paint tests of the school building or would have obtained copies of such tests. Thus, in a sense, the very existence of the alleged prior, current and/or future injuries provide the basis for standing in this case; and, a contrary ruling here would eliminate or dramatically reduce the number of people who both have standing and would be able to seek injunctive relief.

There is another problem with barring the instant litigation. According to the complaint, children have sustained injuries and have sued for damages repeatedly, but to no permanent effect. Now, they are attempting to prevent these injuries from occurring in the future; and, in a sense, they are trying to avoid the necessity for bringing personal injury litigation as well. A class of plaintiffs who have been injured repeatedly should not be prevented from attempting to enjoin the defendant

allegedly responsible for the ongoing harm. Therefore, res judicata should not apply.

Finally, the court notes that it would be reluctant to require plaintiffs "to elect between joining [a] class suit and thereby forfeiting [the] right to seek individual damages, on the one hand, and removing himself [or herself] from the class (and hence risking exclusion from any equitable relief granted) in order to preserve the possibility of bringing a subsequent damage action, on the other." Figueroa v. Dean, 2002 WL 31426205, at \*3 (S.D.N.Y. Oct. 30, 2002)(regarding U.S.C. § 1983 action)(quoting Crowder v. Lash, 687 F.2d 996, 1008 (2<sup>nd</sup> Cir. 1982)). Figueroa v. Dean was based on section 1983 of the United States Code and had due process implications. However, it would be equally "unacceptable," id., to apply the doctrine of res judicata here. "The fundamental value of education is embedded in the Education Article of the New York State Constitution by this simple sentence: 'The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated' (§N.Y. Const, art XI, 1). Campaign for Fiscal Equity v. State, - N.Y.2d -, -, - N.Y.S.2d -, - (June 26, 2003)(avail. at 2003 WL 21468502). Thus, the case at hand, which relates to children's rights to attend school in a safe setting, has great significance.

In addition to this, the legislature and the courts both have recognized the importance of extinguishing the lead paint problem. The lead paint problem has been described as "the most significant environmental disease in New York City, in terms of the numbers of cases, the severity of the medical damage created, and the personal, social, and economic costs it imposes." Baptiste v. New York City Housing; Auth., 177 Misc. 2d 51, 53 n.3, 675 N.Y.S.2d 802, 804 n.3 (Sup. Ct. Kings County 1998)(citations and internal quotation marks omitted). The public health laws relating to lead poisoning "reflect[] the legislature's deep concern for the public's exposure to lead in the

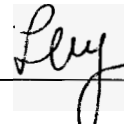
environment . . . ." Chase v. Pistolese, 190 Misc. 2d 477,479, 739 N.Y.S.2d 250, 252 (Watertown City Ct. 2002). There is a particular concern with respect to the dangers of exposure in the case of children, because lead paint "is particularly harmful to brain and nervous system development" which occurs before a child turns six years old. New York City Coalition to End Lead Poisoning, Inc. v. Vallone, - N.Y.2d -, -, - N.Y.S.2d -, - (July 1, 2003)(avail. at 2003 WL 21498390); see Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628,640-41,649 N.Y.S.2d 115, 119 (1996).

For the above reasons, plaintiffs' claims are not barred under res judicata or collateral estoppel. See Messier v. Southbury Training School, 916 F.Supp. 133, 138 (D. Conn. 1996); see also Bindit Copr. v. Inflight Advertising, Inc., 285 A.D.2d 309,313, 731 N.Y.S.2d 43, 47 (2<sup>nd</sup> Dept. 2001). Therefore, it is

ORDERED that defendants' motion for summary judgment is denied.

ORDERED:

Dated: July 14, 2003




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LOUIS B. YORK, J.S.C.