

Alvarez v Inwood Holding LLC
2007 NY Slip Op 30539(U)
March 26, 2007
Supreme Court, New York County
Docket Number: 0109671/2004
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **EMILY JANE GOODMAN**

PART 17

Index Number : 109671/2004

ALVAREZ, VIRGINIA

vs

INWOOD HOLDING

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided as entered*

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

FILED
NEW YORK COUNTY CLERK

Dated: 3/24/07

[Signature]
EMILY JANE GOODMAN, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
VIRGINIA ALVAREZ, an infant, by her legal guardian
INOCENCIA ALVAREZ,

Plaintiff(s),

-against-

Index No. 109671/04

INWOOD HOLDING LLC, MARTIN S. LEVINE and
JANET FALU,

Defendant(s).

-----X
EMILY JANE GOODMAN, J.:

FILED
August 17, 2006
New York
County Clerk's Office

Plaintiff Inocencia Alvarez, the legal guardian and grandmother of the infant plaintiff Virginia Alvarez, brings this action to recover for personal injuries that the infant plaintiff allegedly sustained as a result of lead poisoning, in the apartment owned, operated, and managed by defendants Inwood Holding LLC, Martin S. Levine, and Janet Falu. Defendants move, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint and all “claims and cross claims” asserted against them.¹ The motion is denied as untimely, and, defendants have failed to show “good cause” for the late summary judgment motion.² Even if the

¹No cross claims have been asserted in this case.

²Surprisingly, neither side appears to be aware that the requisite period for filing summary judgment is 45 days post note of issue, not 60 as discussed in the briefs. Here, the note of issue was filed on July 18, 2006, and the preliminary conference order required that all dispositive motions be made on or before 45 days after the filing of the note of issue (which would fall on September 1, 2006). Considering the additional five days for service of the note of issue on defendants (*Krasnow v JRBG Management Corp.*, 25 AD3d 479, 480 [1st Dept 2006]), the motion is untimely inasmuch as it was served on September 20, 2006 (*see* CPLR 2211). Furthermore, “good cause” under CPLR 3212 (a) has not been shown based upon defendants’ counsel’s court appearances after the deadline, and counsel’s claim that his firm was short-staffed with paralegals, especially where counsel failed to contact the court in advance to seek an extension (*see Breiding v Giladi*, 15 AD3d 435 [2d Dept 2005] [unspecified clerical inadvertence and reassignment of counsel insufficient to constitute good cause]).

motion were timely, the court finds that issues of fact prevent granting summary judgment in favor of defendants.

FACTS

According to plaintiff, around February of 1987, she moved into apartment 14 at 124 Sherman Avenue in Manhattan with her husband and four children, who were between the ages of five and twelve at the time. At all relevant times, Ms. Alvarez was the tenant of record in the apartment. In 1988 and 1994, two more children were born to Ms. Alvarez, who also lived in the apartment.

On December 9, 1997, the building was purchased by defendant Inwood Holding LLC from the prior owner, non-party Sherman Equities LLC. Defendants Martin S. Levine and Janet Falu allegedly manage the building. Plaintiffs claim that the building was built prior to 1960.

The infant plaintiff and her twin sister, Veronica Alvarez, were born on July 31, 2000 to Ms. Alvarez's son, Rafael, and Yorkelis de la Cruz. Plaintiff claims that from the time that the children were five days old, they lived almost exclusively with Ms. Alvarez in the apartment, and only visited their mother on weekends and for occasional visits by a social worker. Ms. Alvarez obtained legal custody of the children on February 27, 2002. Plaintiff claims that, in January 2002, she lived in the apartment with four adults and at least seven, and sometimes nine, children, including the infant plaintiff. She alleges that the apartment contained numerous areas with peeling and chipping paint, and that leaks in the bathroom caused the ceiling to become soft and to crack. Plaintiff claims that the kitchen and bathroom had large holes and cracks in the paint and plaster.

Plaintiff asserts that the infant plaintiff was fascinated by holes in the hallway and would

dig into them with her fingers or a spoon. She alleges that she covered the holes with Brillo and tape, but the infant plaintiff peeled the tape off the holes. The building superintendent allegedly also plastered the holes in the apartment on several occasions. Apparently, in January 2003, Ms. Alvarez saw the infant plaintiff eating dust from the hallway wall, and was alarmed because, in 1996, her youngest daughter had been diagnosed with an elevated blood lead level. On January 24, 2003, the infant plaintiff and her twin sister were tested for lead poisoning. The results of the tests showed that both girls had lead in their blood; the infant plaintiff was found to have a high blood lead level of 29 µg/dl.³ Subsequent tests revealed that she had the following blood lead levels: 21 µg/dl on January 31, 2003; 11 µg/dl on March 14, 2003; 9 µg/dl on April 30, 2003; 7.1 µg/dl on October 3, 2003; and 7.1 µg/dl on March 4, 2004.

Because of the infant plaintiff's elevated blood lead levels, the New York City Department of Health and Mental Hygiene (DOHMH) was notified, which then conducted various tests in the apartment. The tests showed that lead exceeding regulatory limits existed in 15 areas in the apartment. On February 12, 2003, DOHMH issued an Order to Abate Nuisance requiring the landlord to abate the lead hazards. In February and March 2003, 21 "immediately hazardous" violations were issued to the landlord, which required that it correct the lead paint hazard on "peeling or deteriorated subsurfaces." According to plaintiff, violations had been issued by JIPD for other apartments in the building prior to the infant plaintiff's diagnosis. Plaintiff claims that the apartment was abated sometime in March 2003 (plaintiff does not state

³According to the Court of Appeals in *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone* (100 NY2d 337 [2003]), the Centers for Disease Control and Prevention has defined a blood lead level of 10 µg/dl or higher (µg/dl means micrograms per deciliter), as "elevated" and "associated with decreased performance on intelligence tests and impaired neurocognitive development and growth" (*id.* at 343).

whether it was the landlord or HPD who abated the condition).

Plaintiff claims that since the infant plaintiff was lead poisoned, she has been aggressive, hyperactive, and restless, and has a short attention span. Plaintiffs commenced this action against defendants, alleging that they were negligent in failing to keep the apartment in a reasonably safe and habitable condition, and violated Title X of the Housing & Community Development Act of 1992.

DISCUSSION

Defendants argue that they cannot be liable for the infant plaintiff's injuries, because they had no notice that a young child was residing in the apartment. They further claim that they had no notice of a peeling paint condition in the Alvarez's apartment. Defendants, however, do not argue that they made reasonable efforts to abate any lead hazard.

Plaintiffs allege in their complaint that the building is a multiple dwelling that was built prior to 1960, and thus, base their negligence claims against these defendants on Local Law 1, the lead abatement provision of the Administrative Code of the City of New York.⁴ Local Law 1 requires the owner of a multiple dwelling to remove or cover paint containing specified amounts of lead (Local Law No. 1 [1982] of City of New York § 1; codified as Administrative Code of City of NY § 27-2056.1, *et seq.* [formerly § 27-2013 [h]]). The law contains a rebuttable presumption that in any building erected prior to 1960, peeling paint in a dwelling unit occupied by a child six years of age or under comprises a hazardous condition (Administrative Code § 27-

⁴Local Law 1 was repealed by enactment of Administrative Code § 27-2056, *et seq.*, however, Administrative Code § 27-2056, *et seq.* was deemed null and void by the Court of Appeals in *Matter of New York City Coalition to End Lead Poisoning, Inc. (supra)*, and thus, by operation of law, Local Law 1 was revived (*id.* at 350; *see also O'Neal v New York City Hous. Auth.*, 4 AD3d 348 [2d Dept 2004]).

2056.5 [formerly § 27-2013 [h] [2]). Such condition constitutes an immediately hazardous (class C) violation of the Housing Maintenance Code (Administrative Code § 27-2056.6 [formerly § 27-2013 [h] [3]).

To impose liability upon a landlord for lead poisoning under Local Law 1, the plaintiff must prove that the landlord had actual or constructive notice that a child under the age of seven years of age was residing in the apartment, and that the landlord had actual or constructive notice of the hazardous lead condition (*Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 646 [1996]; *Woolfalk v New York City Hous. Auth.*, 263 AD2d 355, 355-356 [1st Dept 1999], *appeal dismissed* 4 NY3d 739 [2004]). Since Local Law 1 provides landlords with an implicit right of entry to inspect and repair, where a landlord has notice that a young child is residing in an apartment, the law deems that the landlord has constructive notice of the hazardous lead condition (*Juarez*, 88 NY2d at 647; *Cartagena v Jin Lung Tang*, 260 AD2d 337, 338 [2d Dept 1999]; *Rivas v 1340 Hudson Realty Corp.*, 234 AD2d 132, 135 [1st Dept 1996]). Thus, the landlord's liability revolves solely around whether it had notice of a child under seven living in the apartment and the year when the building was built--the landlord's actual notice of the lead paint condition is immaterial (*Woolfalk, supra*). Such notice is deemed to continue until the hazard is abated and runs to any affected child under the age of seven (*Baptiste v New York City Hous. Auth.*, 177 Misc 2d 51, 54 [Sup Ct, Kings County 1998]).

Defendants have failed to show that the standard in *Chapman v Silber* (97 NY2d 9 [2001]) applies here. In *Chapman, supra*, the Court of Appeals addressed what a plaintiff may show to raise a triable issue of fact in response to a landlord's motion for summary judgment in a lead poisoning case, in the absence of controlling legislation such as Local Law 1, given that the

injuries took place in Albany, New York (*id.* at 15, 20, 21). The Court, citing *Juarez* with approval, held that in instances where a local law did not govern, notice may be established by showing 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 (*id.* at 15; *see also Wynn v T.R.I.P. Redevelopment Assocs.*, 296 AD2d 176, 180 [3d Dept 2002]).

Defendants have not submitted any evidence indicating that the subject premises is not a multiple dwelling (*see e.g. Netral v Lippold*, 304 AD2d 491, 492 [1st Dept 2003]; *Chadwick v Sabin*, 304 AD2d 603, 604 [2d Dept 2003]). They have also not argued that the building was built after 1960 such that the presumption in Local Law 1 would not apply (*see Herrera v Persaud*, 276 AD2d 304, 305 [1st Dept 2000]). Contrary to defendants' contention, plaintiffs do not need to establish that defendants knew when the building was built. Unlike the standard in *Chapman*, a defendant's knowledge of the age of the building is not an element of a claim under Local Law 1 (*see Juarez*, 88 NY2d at 646). Accordingly, defendants' attempt to show that *Chapman* governs here, and that *Juarez* was somehow implicitly overruled because the Court of Appeals in *Chapman* wanted to set a global standard for review of lead paint cases in New York State, is borderline frivolous (*see Worthy v NYCHA*, 21 AD3d 284 [1st Dept 2005] [citing *Juarez* and decided post *Chapman*, Court held that question of fact existed as to whether movants had constructive notice that child under seven resided in apartment).

Defendants, to establish, *prima facie*, that they had no notice that a young child was residing in the apartment, submit the deposition testimony of Janet Falu, a named defendant and

assistant administrator of Inwood Holding LLC, and Alejandro Nunez, the building superintendent. In opposition, plaintiffs contend that the deposition transcripts are incompetent evidence, because they are unsigned. This argument is without merit. Although the transcripts are in fact unsigned, both deposition transcripts are certified by the court reporters, and plaintiffs do not challenge the accuracy of either transcript. Under these circumstances, the Appellate Division, First Department, has determined that unsigned deposition transcripts may be considered on a motion for summary judgment (CPLR 3116 [a]; *White Knight Ltd. v Shea*, 10 AD3d 567 [1st Dept 2004]; *Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]).

Falu testified at her deposition that she has worked for the owner for nine years, and has visited the subject premises on numerous occasions (Falu Dep., at 12, 18). She knew that Ms. Alvarez resided in the building, but was unaware whether anyone else lived in her apartment (*id.* at 21). As for Mr. Nunez, he testified that Ms. Alvarez resided in her apartment with her four adult children (Nunez Dep., at 25), but when asked if he knew whether any children under the age of 10 lived in the apartment, he stated that “I can’t say because I would go there for complaints, but I can’t say each person that lives in an apartment. I knew about her four older children” (*id.* at 26). Mr. Nunez never saw Ms. Alvarez with small children either in the street or in the building (*id.* at 41).

In opposition, plaintiffs submit the following evidence to demonstrate that there are triable issues of fact as to whether defendants had notice that a young child resided in the apartment. Plaintiffs rely upon portions of plaintiff’s deposition, at which she stated that she told the landlord about the holes in the walls. On three to four occasions, the superintendent placed

plaster inside the holes, and told her to tell the girls not to stick their fingers in the holes again (Alvarez Dep., at 65-66, 122). Plaintiffs offer an affidavit from Ms. Alvarez averring that, in 2002, she lived in the apartment with her grandchildren, Jadzia, Indiana, Angel, and Lizann Collazo, the infant plaintiff, and her sister, Veronica Alvarez. According to Ms. Alvarez, all of her grandchildren were very small at the time and their toys and clothing were “everywhere” in the apartment. Four of her grandchildren still slept in cribs. She further avers that, every time that the superintendent came in to fix the holes, or to do any minor repairs, the children watched him work. The superintendent told her to keep the girls away from that area because they were making it worse (Alvarez Aff., ¶¶ 8-10).

Any knowledge by the building superintendent, as the owner’s agent, is imputable to the owner (*see Ibert v Tuscan Assocs., Inc.*, – AD3d –, 2007 WL 328947, *1 [1st Dept, Feb. 6, 2007]; *Primrose Mgt. Co. v Donahoe*, 253 AD2d 404, 406 [1st Dept 1998]). Therefore, plaintiffs’ evidence is sufficient to create a triable issue of fact as to whether defendants had, at the very least, constructive notice that a young child was living in the apartment (*see Munoz v 42 Holding Corp.*, 30 AD3d 361, 361-362 [1st Dept 2006] [plaintiff raised issues of fact based on multiple repairs made by superintendent in the apartment, and by the fact that the plaintiff and superintendent lived on the same floor]; *cf. Worthy v New York City Hous. Auth.*, 18 AD3d 352 [1st Dept 2005] [plaintiff’s evidence that infant child was “occasionally observed” in the company of his aunt, the tenant of record in the apartment, was insufficient to raise a triable issue of fact]).

The court notes that defendants have not argued that the causes of action alleging violations of the Housing and Community Development Act of 1992 should be dismissed

(Complaint, fourth, fifth, and sixth causes of action). Therefore, the court declines to dismiss these causes of action.

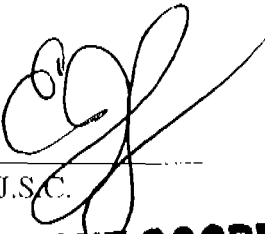
Accordingly, it is

ORDERED that the motion by defendants Inwood Holding LLC, Martin S. Levine, and Janet Falu for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: March 26, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
APR 05 2007
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