

**Vega v New York City Hous. Auth.**

2007 NY Slip Op 31173(U)

May 8, 2007

Supreme Court, New York County

Docket Number: 0105502/2005

Judge: Walter B. Tolub

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SCANNED ON 5/14/2007

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

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

Index Number : 105502/2005

VEGA, GEVALIA

vs

HOUSING AUTHORITY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE: 3.30.07

MOTION SEQ. NO. \_\_\_\_\_

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

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 *is denied as unavailing*  
*and the accompanying memorandum decisional order*

**FILED**

MAY 14 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5/8/07

WALTER B. TOLUB  
*J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
GEVALIA VEGA, an infant, by her father  
and natural guardian RAYMOND VEGA, and  
RAYMOND VEGA, individually

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.  
-----x

Index No. 105502/05  
Mtn Seq. 001

**FILED**  
MAY 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**WALTER B. TOLUB, J.:**

This is an action arising out of an alleged exposure to hazardous lead paint conditions at 711 FDR Drive, Apartment 7G in Manhattan (the subject apartment). Gevalia Vega (the infant plaintiff) was born on May 9, 2002. Raymond Vega (Mr. Vega) is the infant plaintiff's father and natural guardian. The subject apartment is owned, operated and maintained by defendant, the New York City Housing Authority (NYCHA).

At all times, the only tenant of record for the subject apartment was Maria Vega, Mr. Vega's mother (Notice of Motion, Exhibits I, J). Mr. Vega, who had at one point lived with his mother, was not an authorized tenant. Moreover, his attempts to become an authorized tenant in the apartment in 1999 and 2004 were rejected by defendant NYCHA. (Notice of Motion Exhibit K).<sup>1</sup>

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<sup>1</sup> Mr. Vega was rejected in 1999 because he failed a criminal background check (Notice of Motion, Exhibit K). His 2004 application was similarly disapproved (Id.).

Notwithstanding the lack of authorization by NYCHA, it appears that Mr. Vega was living at the subject apartment on a regular basis with the infant plaintiff from July of 2002 (Transcript of Raymond Vega p. 32). On February 14, 2004, a routine blood test performed on the infant plaintiff resulted in a diagnosis of an elevated blood lead level of elevated lead level of 23.6 ug/ml (Notice of Motion, Exhibit O). A second test taken less than two weeks later showed a significantly reduced blood lead level of 10.8 ug/ml (id.). By April 16, 2004, the infant plaintiff's blood lead level was 9 ug/ml, and in March of 2005, a blood lead level of 6.0 was reported (id.). Medical therapy was not prescribed for the infant plaintiff (Notice of Motion, Exhibit O and P), and no lead abatement was ever performed at the subject apartment (Notice of Motion, Exhibit M).<sup>2</sup>

In April of 2005, plaintiffs commenced the instant action. Comprised of four causes of action, the complaint asserts claims of negligence, breach of contract and implied warranty of habitability, nuisance, and negligent and/or intentional infliction of emotional distress. By this motion, defendant moves for an order pursuant to CPLR 3212 granting summary judgment against plaintiffs' claims and dismissing this action.

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<sup>2</sup> In fact, lead testing done in the subject apartment in April, 2004 did not find higher than normal lead levels (Id.).

Discussion

As with any motion for summary judgment, success requires the moving party to prove, by competent, admissible evidence, that no material and triable issues of fact exist (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 [1st Dept 2002]; see generally, Barr Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2006] § 37:91-92). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340 [1<sup>st</sup> Dept 2003]).

In cases involving lead-based paint exposure, for a landlord to be held liable for injuries caused by the exposure, the plaintiff is required to demonstrate that the landlord had actual or constructive notice of both the existence of the hazardous paint condition and that a child under the age of seven resided in the unit containing said hazardous condition (Juarez v. Wavecrest Management Team LTD., 88 NY2d 628 [1996]; Rivas v. 1340 Hudson Realty Corp., 234 AD2d 132 [1<sup>st</sup> Dept 1996]). A landlord does not have an affirmative duty to ascertain whether a child under the age of seven lives in any of the landlord's units

Plaintiffs' opposition to the instant motion, comprised of mostly conclusory statements and vague descriptions made by Mr. Vega<sup>5</sup> and his aunt, Josephine Olivencia,<sup>6</sup> about individuals allegedly spoken with in during the relevant time frame in both the Building and NYCHA offices, is insufficient to demonstrate that the defendant was on notice that Mr. Vega and his infant

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<sup>5</sup> Mr. Vega's testimony at deposition included the following:

Q: And in '98, they told you that you weren't authorized to live in the building because of the '97 arrest; is that right?

A: Yes.

Q: What else did they tell you?

A: There was a five-year waiting period. The manager told my mother and I.

Q: Who was the manager?

A: It was a - a Caucasian man. I don't remember his name

Q: Do you know what he looked like?

A: White hair, about six-one. (Tr. p. 36) [...]

Q. Now you said the building knew that you were there -

A. Yes.

Q. What's the basis for you to say that, that building knew?

A. A new manager came over and took - took place. A - a - like a black lady - a heavy set black lady. She has like a French name. She told my mother "While the - while this is pending, you could stay there." But she seen my mother's condition

Q. Now -

A. She's the manager currently.

Q. When did she take over that position as manager?

A. I don't remember. (Tr. p. 44-45).

In pertinent part, Ms. Olivencia's affidavit states:  
 I was present in the Management Office of the New York City Housing Authority at 54 Avenue D, Brooklyn, New York with my sister on two or three occasions when she made a request for her son, Raymond Vega, and her granddaughter, Gevalia Vega to be listed as tenants in the apartment [...] A discussion was had with an employee of the New York City Housing Authority, a heavy-set African American Woman [...] (Aff. in Opp. Ex, D).

daughter were living in the apartment (Banco Popular North America v Victory Taxi Management, Inc., 1 NY3d 381[2004] (''averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (Id. at 383)). The affidavit submitted by plaintiffs' attorney is equally insufficient as it is not accompanied by any admissible proof (Lupinsky v. Windham Construction Corp., 293 AD2d 317 [1<sup>st</sup> Dept 2002]; (Zuckerman v City of New York, 49 NY2d 557 [1980])).

Inasmuch as plaintiffs have not established that there exists a triable issue of fact, summary judgment is warranted. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that the within action is dismissed; and it is further

ORDERED that the Clerk of Court enter judgment in favor of defendant, the New York City Housing Authority.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/8/07

**FILED**  
 MAY 14 2007  
 NEW YORK COUNTY CLERK  
 HON. WALTER B. TOLUB, J.S.C.