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

PRESENT: EILEEN A. RAKOWER J.S.C. PART Part 5

Index Number : 111189/2000
GONZALEZ, JAQUELINE
VS
CURT REALTY LLP
Sequence Number : 016
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 24 2007
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 5/17/07

EILEEN A. RAKOWER 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: PART 5

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JAQUELINE GONZALEZ, an infant by her mother and natural guardian, MARIA BETANCOURT and MARIA BETANCOURT, Individually,

Plaintiffs,

Index No. 111189/00

- against -

Decision and Order

CURT REALTY LLP and FARKAS MANAGEMENT,

Defendants.

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CURT REALTY LLP and FARKAS MANAGEMENT,

Third Party Plaintiffs,

- against -

THE CITY OF NEW YORK and NEW YORK CITY PARKS AND RECREATION DEPARTMENT,

Third Party Defendant.

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HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries sustained when the infant plaintiff was allegedly exposed to lead paint in her home located at 232 Sherman Avenue Apt. 58, New York, New York. Third party defendant the City of New York s/h/a the New York City Parks and Recreation Department ("City") moves for summary judgment pursuant to CPLR 3212 dismissing the third party complaint against it. Defendants/third party plaintiffs Curt Realty LLP and Farkas Management oppose City's motion and cross move to strike City's answer or, in the alternative, to preclude City from arguing that it had no notice of dangerous lead conditions due to

City's spoilation of crucial evidence. Plaintiffs do not submit papers opposing either motion.

The infant plaintiff was born on September 18, 1992. She lived with her parents in apartment 51, in a building owned by defendant Curt Realty LLP ("Curt") and managed by Farkas Management ("Farkas") at 232 Sherman Avenue. In 1995 the family moved to apartment 58 ("58") within the same building. On October 30, 1995, three months after moving, infant plaintiff was diagnosed with an elevated blood lead level. In November 1995, someone from the Department of Health ("DOH") inspected 58 and found lead violations. Specifically, the "dumbwaiter door" was found to have lead levels above acceptable limits. Additionally, the report indicated that the child was observed "picking or gnawing" the paint. An "order to abate" was issued to defendants on December 13, 1995 and in March, 1996 DOH re-inspected 58 and found that the abatement had been completed. Defendants/third party plaintiffs subsequently hired their own inspector who discovered that there were high levels of lead on playground equipment in a nearby City owned park, where infant plaintiff played.

City, in support of its motion, argues there is no evidence that infant plaintiff's elevated blood lead level was caused by exposure to a lead paint hazard in the park. City submits the deposition testimony of Maria Betancourt, infant plaintiff's mother. Ms. Betancourt testified about her visits to the subject park:

> Q: So when she was old enough would that be when she was able to walk you would bring her to the park?
> A: Yes, she would go to the park, not too much though.
> Q: You would always bring her to 207th street and Seaman avenue?
> A: Yeah, that was the only place I would go. (Betancourt Deposition, Page 58, Lines 24-25 & Page 59, Lines 1-7)
> ...
> Q: When Jacqueline was at the park did you have a stroller for her or did she walk to the park from your home?
> A: I have a stroller for Jackie.
> Q: So if she were in the park would she walk around the park at all by herself or ride in the stroller?
> A: I would push her around with the stroller but when I was going to put her in the swing I would put her down and put her in the swing and to

bathe her also I would take her out from the stroller.
Q: Were there any times that you were in the park that you would leave Jackie unattended in 1995?
A: Never. (Betancourt Deposition Page 62 Line 24- Page 63, Line 14).

According to the independent lead inspection conducted by defendants/third party plaintiffs, high levels of lead were found on the "slide handrail", the "swing set beam support" and the "toddler play area gate and fence." City argues that the infant plaintiff did not come into contact with any of these areas, Ms. Betancourt did not leave the infant plaintiff out of her sight, and that Ms. Betancourt did not observe her putting anything in her mouth and thus she could not have been exposed to lead at the playground.

Q: In 1995 when Jacqueline was three years old what playground equipment did you see her on?
A: Almost all the time in the swings.
...
Q: Did you ever see her put her mouth on the swing?
A: Not that I remember.
Q: What other things did Jacqueline do when she was at the park in 1995?
A: I put her in the water holding her by the hand.
...
Q: Did you notice any peeling paint in that area where the water was?
A: No, I didn't notice.
Q: Is there any other equipment that Jacqueline used when she was three years old at the park?
A: She always liked the swing and to get wet a little bit.
...
Q: Did you ever see Jackie use the slide at the park in 1995?
A: The what?
Q: The slide?
A: No.
Q: Why?
A: The only thing she liked was the swing and the water.
...

Q: Did you ever see Jackie put anything in her mouth at the park that was not food?
A: No, because I was always holding her, I wouldn't let her.

Further, City claims that it did not have notice of the lead condition which allegedly caused infant plaintiff's injuries. City submits the deposition testimony of Lawrence Scoones, Principal Parks Supervisor since 1985. Mr. Scoones testifies that he never received any complaints about peeling paint at the Emerson Park playgrounds.

Q: From '94 to '98 when you held the position, were you ever made aware of complaints regarding to peeling paint in any of the playgrounds in Inwood Hill Park?
A: No.

City also submits the Deposition testimony of Samuel Akinyemi, Director of the Parks' Environmental Control Unit. Mr. Akinyemi testifies that any records based on inspection or complaints regarding lead based paint in Emerson Park would have been directed to his office and that he has never received any of these types of complaints.

Q: Did you perform a search for any records related to complaints or testing for lead-based paint in the Emerson playground in Inwood Hill Park?
A: If I did a search? Yes, they asked me. Yes, search for a record and there is nothing in there for Emerson.

Mr. Akinyemi testifies as to how he maintains these records.

Q: When you receive a complaint about the site, do you make it a policy to physically go there yourself?
A: When I receive a complaint, I open a file for a particular site, then we call a consultant to go to the site or sometimes I will tell them I'll meet them at the site and see what is going on. Then I have a record in case somebody called a day after or five years from now so we have a folder and we can go back to reflect my memory. (Akinyemi Deposition, Page 26, Lines 16-25 and Page 27, Lines 2-3)

...
Q: Okay. Where are these records maintained?
A: In our office.
Q: Where are they in the office?
A: They are kept in the cabinet. We have a cabinet that we put all the records pertaining to environmental issues. (Akinyemi Deposition, Page 27, Lines 9-15)

Defendants/third party plaintiffs, in opposition, acknowledge that the DOH found lead violations in 58 but argue that there is a question of fact as to where the infant plaintiff was exposed to the lead which caused her injuries. Defendants/third party plaintiffs point out that Ms. Betancourt brought the infant plaintiff to Emerson Park from 1992 until 1995, the year she was diagnosed with lead poisoning. Defendants/third party plaintiffs submit an affidavit of Laurence B. Molloy, president of the Molloy Corporation. Mr. Molloy a purported expert with certifications issued by the United States Environmental Protection Agency, states his findings of the tests conducted at Emerson Park:

> "The percentage of lead detected on the Inwood Hill Park playground slide handrail was 3.45%. The percentage of lead detected on the . . . swing set beam support was 8.73%, and the percentage . . . detected on the . . . toddler play area gate and fence was 23.46%."

Mr. Molloy goes on to compare the park findings with the DOH findings at 58 and give his expert opinion as to what the cause of infant plaintiff's injuries were:

> "In contrast, the percentage of lead detected on the dumbwaiter door in the kitchen of Apartment 58, was only .60% . . . In my opinion . . . it is far more likely that Jacqueline Gonzalez's positive blood lead level in October 1995 came from the playground, and not from the apartment."

Defendants/third party plaintiffs further contend that City's method of re-painting playground equipment and park furniture may also have contributed to a risk of lead exposure:

> Q: Before performing painting on the playground equipment or park benches or something, were workers required to sand or scrape or do

> anything to the peeling paint?
> A: Typically, they would have taken a wire brush or scraper and scraped it down and then applied new paint. (Scoones Deposition Page 80, Line 4-10)

Mr. Molloy affirms that this method of preparation and painting the structures in the park exacerbated the risk of lead exposure. Specifically, Mr. Molloy points out that if lead paint was scraped off, the lead particles could have contaminated the area and especially the soil in the area.

> "Once soil has become contaminated with lead, which is not biodegradable, it remains a long term source of lead exposure." (Molloy Aff. at Paragraph 35)

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

The discovery of lead in 58 does not preclude the possibility that infant plaintiff's elevated lead levels came from more than one source. However, proof of exposure to such other sources is essential, and the mere possibility of exposure or speculation regarding such exposure are not sufficient to defeat the motion for summary judgment. While high levels of lead were discovered in the playground which infant plaintiff visited with her mother, there is no evidence the child contacted to offending equipment. Indeed, her mother clearly testifies that her contact with the playground equipment was limited to the swings and water, and that the mother put her in the swings and held her hand while she was in the water.

That the City's method of scraping and painting the playground equipment may have caused lead to contaminate the soil under the swings where infant plaintiff

played, without evidence that the child played in that soil, and that the soil itself was tested and yielded evidence of lead, does not raise an issue of fact. Mr. Molloy, despite his assertions, fails to remark that the deposition testimony reveals that the chains where the child holds on when on the swing are not painted; and he did not test the water or the ground soil where the infant plaintiff played. These are the areas where testimony reveals the child had contact with the play equipment, not the gate or the slide or the beam support of the swing set. Finally, Mr. Molloy's conclusion that "a toddler's exposure to the lead levels found on the Playground Slide Handrail, the Swingset Beam Support, and/or the Toddler's Play Area Gate and Fence at Inwood Hill Park Playground *possibly can cause* lead poisoning [emphasis added]" hardly rises to the level of an opinion to a reasonable degree of certainty in the expert's field. Thus, defendants/third party plaintiffs have failed to show that infant plaintiff had contact with a lead source in the park and failed to raise an issue of fact sufficient to defeat summary judgment. Thus, City's motion must be granted.

Defendants/third party plaintiff's cross motion to preclude City from testifying that it had no knowledge of a lead hazard in Emerson Park due to their spoliation of crucial evidence is denied as moot.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the third party complaint is hereby severed and dismissed as against third party defendants The City of New York and the New York City Parks and Recreation Department, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that defendants Curt Realty LLP and Farkas Management's cross motion to preclude The City of New York from testifying about its lack of notice is denied as moot, and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. City shall serve a copy of this order with notice of entry upon all parties and the Trial Support Office, 60 Centre Street, Room 158.

ORDERED that the remainder of the action shall continue.

DATED: May 17, 2007

EILEEN A. RAKOWER, J.S.C.