Scott v City of New York
2007 NY Slip Op 33484(U)
September 27, 2007
Supreme Court, Kings County
Docket Number: 0026896/1995
Judge: Martin M. Solomon
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At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of September, 2005

PRESENT:

HON. MARTIN M. SOLOMON,

Justice.

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RICKIE SCOTT, et. ano.,

Plaintiff(s),

- against -

Index No. 26896/95

THE CITY OF NEW YORK,

Defendant(s).

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5 - 6
Reply Affidavits (Affirmations)	7 - 8
___ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Bertram Fields moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the plaintiffs' complaint. By separate motion, defendant Merco Properties, Inc. (Merco), moves for the same relief (hereinafter, Fields and Merco are collectively referred to as defendants).[1] The City submits

[1] Only defendants Fields, Merco and the City of New York (the City) have appeared in the action. Marlyn McKenzie; Michael J. Kenny; The Brooklyn Arms Hotel a/k/a The Grenada

an affirmation in which it joins in plaintiffs' opposition to defendants' respective motions for summary judgment.

Facts and Procedural Background

In this action, plaintiffs seek to recover for damages allegedly suffered as the result of exposure to lead-based paint while residing at the Brooklyn Arms Hotel (the Hotel). Plaintiffs are members of the Scott family, i.e. Ruby, her children and her grandchildren. Ruby is the mother of Janice Floyd (born 7/27/78), Jimmie (born 8/22/79) and Jaime (born 8/22/79), infants, and Barbara, Judy, Lydia, Rachelle, Denise and Natasha, who are the mothers of the remaining defendants. Barbara's children include Shamar (born 4/26/80), David (born 2/22/82), Manuel (born 4/16/83), Allan (born 11/23/84), Shawntay (born 10/18/85) and Minerva (born 12/28/87); Judy's children include Christopher (born 8/8/84), Daniel (born 1/4/86) and Juliesa (born 8/28/89); Lydia's children include Erik (born 12/28/84), Fantia (born 1/12/87) and Tarell (born 6/23/89); Rachelle's children include Kellie (born 7/26/88) and Rickie (born 7/12/90); Denise's children include Jamel (born 7/31/89); and Natasha's children include Shawanda (born 5/31/91) (the nineteen children shall be collectively referred to as the infant plaintiffs). Many of the underlying facts are not in dispute.

The Hotel, located at 268 Ashland Place in Brooklyn, is owned by Fields and is

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Hotel a/k/a The Ashland Place Shelter; Hotel Grenada Estates, Inc.; and Moses Rhodesm are in default. Tri-Continental Hotel Corp., Bhushankunar Gupta and Granada Leasing Corp. were named as defendants but were never served. Joseph Merolla died before the action was commenced.

described by various people who testified herein as being between 12 and 16 stories tall and having 267 to 361 rooms. Fields purchased the property in 1950 and owned it throughout the period relevant to the instant action. At the time of the purchase, the property was known as The Granada Hotel; later, it became known as the Brooklyn Arms Hotel and/or the Ashland Place Shelter.

Pursuant to a written agreement dated October 18, 1966, Fields leased the Hotel to Merco for a term that will end on May 31, 2011; Joseph Merolla, Sr. (Merolla) was the president of Merco. Merolla died in 1981. During the same year, plaintiffs were placed in the Hotel by the City, who provided, paid for, operated and supervised housing for homeless persons, including the Scotts. In October 1983, a group of investors purchased Merco and the lease was transferred to them.

As is pertinent to the motions now before the court, plaintiffs claim that infants Janice, Jimmie, Jamie, Shamar, David, Manuel, Allan and Christopher were exposed to lead paint at the Hotel from 1981 to December 1984. Plaintiffs further aver that during the time that the Scotts resided at the Hotel, no efforts were made by defendants to abate the alleged hazardous lead paint condition. Plaintiffs accordingly assert causes of action premised upon negligence per se, negligence, gross negligence, recklessness and prima facie tort, in which they allege that defendants violated New York City Health Code § 173.13 and New York City Housing Maintenance Code § 27-2013 in that defendants failed to inspect for and/or to abate the hazardous lead paint conditions in the Hotel (tenth cause of action); nuisance

(fourteenth cause of action); and breach of the express and/or implied warranties of habitability (twenty first cause of action).[2]

Timeliness of the Motions

The Parties' Contentions

Plaintiffs argue that since they filed their note of issue on June 30, 2004 and defendants served their notices of motion on November 22 and 23, 2004, the motions are untimely.

In response, defendants argue that inasmuch as discovery was not yet completed at the time that the note of issue was filed, the parties entered into a stipulation that provided that discovery would continue; the stipulation was filed with the note of issue. Fields and Merco therefore assert that their motions for summary judgment are timely, since it was necessary that discovery be completed prior to making the motions. More particularly, a witness for the City was not deposed until November 4, 2004 and the motions for summary judgment were served shortly thereafter and made returnable on December 15, 2004.

The Law

Rule 13 of the Uniform Civil Trial Rules of the Supreme Court, Kings County, provides that summary judgment motions must be made within 60 days of the filing of the note of issue (*see generally First Union Auto Fin. v Donat*, 16 AD3d 372, 373 [2005]). It

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[2] Inasmuch as neither defendant addresses plaintiffs' cause of action sounding in prima facie tort in the motions for summary judgment, it will similarly not be addressed in this decision.

is now well settled "that 'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion -- a satisfactory explanation for the untimeliness -- rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). In so holding, the Court of Appeals reasoned that "if the merit of the motion itself constituted good cause, the statutory deadline would be circumvented and the practice of delaying such motions until the eve of trial encouraged" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004], citing *Brill*, *id.*). Hence, "[i]n the absence of a 'good cause' showing, a court has no discretion to entertain even a meritorious, non-prejudicial summary judgment motion" (*see e.g. Hesse v Rockland County Legislature*, 18 AD3d 614, 614 [2005], citing *Brill*, *id.*; *Thompson v New York City Bd. of Educ.*, 10 AD3d 650, 651 [2004]).

Discussion

Here, it is undisputed that defendants did not file their respective motions for summary judgment within the requisite 60 days specified by the court rules. They adequately demonstrated good cause for the delay, however, by explaining that the note of issue was filed along with a stipulation that permitted discovery to continue and that the motions were made returnable well within 60 days of completion of discovery. Although plaintiffs argue that the date of the filing of the note of issue should start the running of the 60-day period because neither defendant relied upon any of the testimony adduced at the City's deposition, neither defendant could have known that the testimony would be of no relevance to the

pending motions until after the deposition was completed.

Hence, under these circumstances, the court concludes that defendants demonstrated good cause for the delay in making the motion (*see Certified Elec. Contr. v City of New York (DOT)*, 18 AD3d 596 [2005] [the trial court should have entertained the motions for summary judgment where the parties did not so move until more than 120 days after the filing of the note of issue, but the record demonstrated good cause for the delay under circumstances where a court order stayed the parties from making the motion pending the completion of disclosure and the note of issue was conditioned upon the completion of discovery and thus did not indicate a state of trial readiness]; *Gaffney v BFP 300 Madison*, 18 AD3d 403 [2005] [the court providently exercised its discretion in considering the summary judgment motion, notwithstanding its untimeliness, where plaintiffs demonstrated "good cause" by explaining that the delay was due, in part, to a defendant's failure to produce a witness for deposition in a timely fashion prior to the filing of note of issue and by the delay in obtaining a transcript of said deposition]; *Quizhpi v Lochinvar*, 12 AD3d 252 [2004] [good cause existed for the filing of a late motion for summary judgment where the court acquiesced in, and had actual knowledge of, ongoing discovery subsequent to the filing of the note of issue, which was confirmed in a writing authored by plaintiff's counsel]; *Kunz v Gleeson*, 9 AD3d 480, 481[2004] [the court providently exercised its discretion in entertaining defendant's motion for summary judgment, which was made about two weeks beyond the deadline fixed by the court when it certified the action ready for trial, where she

demonstrated good cause for her slight delay by explaining that the independent medical examinations of plaintiff were not conducted until after the note of issue had been filed and that the results of these examinations provided the evidentiary basis for her motion for summary judgment]).

Negligence/Statutory Violations

Fields' Contentions

In support of his motion, Fields relies upon an affirmation from counsel; his deposition testimony; the deposition testimony of James Slattery, the manager of Merco during the relevant time period; the lease agreements; and the notices of violation issued by the City to argue that the evidence fails to prove negligence on his part. More specifically, Fields contends that plaintiffs are unable to prove that he had actual or constructive notice of a lead paint condition in the Hotel or that a child under the age of six resided there prior to December 1984. In this regard, Fields argues that any knowledge on the part of Merco may not be imputed to him.

As is pertinent to his motion, Fields testified at his deposition, which was conducted on May 20, 2004, that he leased the subject property, but that he had no independent recollection of the agreements. Fields further testified that he met Merolla, Merolla's son (Merolla, Jr.) and Slattery during visits to the Hotel; that he visited the premises very occasionally, probably less than ten times; that he did not conduct any inspections of the Hotel during the time that the property was leased to Merco; and that his attorney advised

him when the lease was made that he "had absolutely nothing to do with the operation of the building."

When questioned about the lead paint violations, Fields testified that he may have received copies of violations against the building from the City "after the tenure of Mr. Merolla," sometime in the 1980's. Fields further stated that he saw children in the Hotel during his visits, but did not recall if they were young. He also did not recall when he visited the Hotel; how often he visited; seeing any peeling paint, holes in the walls or falling plaster during his visits; having any conversations with regard to the condition of the Hotel with any of the managers of the premises; seeing any lead paint violations from the City during the relevant time period; or being notified of any repairs or improvements made to the Hotel during the period of Merco's lease. Further, one year after plaintiffs moved out of the Hotel, Fields had a Housing and Buildings Department search conducted, which uncovered various notices of violation that had been mailed to Merco and/or Merolla directly at the Hotel.

At his deposition, which was conducted on July 29, 2004, Slattery testified that he held five per cent of the shares of Merco's stock. Merco maintained an office at the Hotel, located in the lobby; Slattery worked out of that office and was present at the premises during "normal business hours," Monday to Friday. Slattery further testified that he met Fields a couple of times, but he did not recall Fields being present at the premises and Fields did not maintain an office in the building.

While Slattery was employed at the Hotel, he inspected the building, but not pursuant

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to a schedule; he did not recall seeing peeling paint. Further, improvements were made during his tenure, including the installation of new windows, doors and locks and the refurbishing of all of the units. The refurbishing, which began in October 1983 and continued for about 12 months, consisted of making sure that the bathrooms were fully functional, repairing the light fixtures, and scraping and painting. The property manager, Philip Philipoise, supervised the work; Philipoise's duties also included overseeing maintenance and repairs.

Slattery further testified that prior to 1985, he did not recall receiving any complaints regarding peeling paint or broken plaster; complaints would be made to Philipoise. When he became involved with Merco, there were violations against the property, although he did not recall what they were for or how many there were; additional violations were thereafter received. Violations would by given to Philipoise to institute corrective action. Slattery did not believe that Fields was informed when a violation was received. Slattery was aware that the City placed persons in need of housing in the Hotel and that children under the age of six resided there. The City would telephone the Hotel to ascertain whether a room was available and the person would arrive the same day with a check; Slattery did not recall who wrote the checks.

Copies of the lease agreements establish that in 1966, Fields entered into a management agreement with certain individuals and leased the Hotel to Merco. Pursuant to the lease agreement, Merco was required to "promptly comply with all laws and ordinances

and the orders, rules, regulations and requirements of all federal, state and municipal governments and appropriate department, commissions, boards and officers thereof" (Lease agreement, Art VII, section 1). The lease further provided that Merco "shall also comply with all notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by any state, county or municipal department having jurisdiction against or affecting the leased premises." Additionally, the lease provided that Fields was authorized "to enter the demised premises at all reasonable times during normal business hours for the purpose of (a) inspecting the same and (b) making any necessary repairs to the demised premises and performing any work therein that may be necessary by reason of Lessee's default under the terms of this lease" (Lease Agreement, Art XI, § 1).

Fields also relies upon copies of various notices of lead paint violations issued against the building by the City and dated between July 14, 1982 and October 3, 1983 to argue that they were mailed to the address of the Hotel and issued to the Granada Hotel, Joseph Merolla and/or the Manager, and not to him.

Merco's Contentions

In support of its motion, Merco relies upon an affirmation from counsel, the deposition testimony of Fields and Slattery, and the lease agreements to argue that liability cannot be imposed upon it pursuant to New York City's lead paint law, since plaintiffs cannot demonstrate that Merco had complete and exclusive control of the premises.

Merco also argues that Slattery's deposition testimony establishes that prior to

purchasing his interest in Merco in 1983, he never visited the subject premises. He further testified that the premises were refurbished between October 1983 and late 1984. Moreover, prior to January 1985, Slattery was not aware of any complaints regarding the presence of lead paint at the premises. In addition, he did not recall that Merco received any complaints about peeling paint at the site prior to January 1985, that the City conducted any emergency repairs or that the Scott family resided in the building.

Plaintiffs' Contentions

In opposition to the motions, plaintiffs rely upon an affirmation from counsel; an affidavit from Queen,[3] as a representative of plaintiffs; the deposition testimony of Fields and Slattery; excerpts from the transcript of the 50-h hearing of Ruby (conducted on February 6, 1995); Lydia (conducted in April 1995), and Barbara (conducted on March 20, 1995); excerpts of the deposition testimony of Janice (conducted on August 21, 2003), Judy (conducted on February 18, 2004), Rachelle (conducted on April 13, 2004), Natasha (conducted on January 21, 2004), Denise (conducted on January 14, 2004), Queen (conducted on April 16, 2004), Jimmie (conducted on August 20, 2003), Jamie (conducted on August 20, 2003), Manuel (conducted on August 22, 2003), Sharonnie Perry (conducted on November 21, 1996), Merolla, Jr. (conducted on February 10, 1997), Frank C. Jackson (conducted on February 21, 1997), Kunju Philipoise (conducted on March 4, 1997), Arthur Ross (conducted on September 22, 1997), and Alan Fast (conducted on September 22, 1997);

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[3] Lydia is now known as Queen.

the depositions of Slattery (conducted on July 14, 1994) and Philipoise (conducted on January 11, 1989) in the action captioned *Kenneth Smith, an infant by his mother and natural guardian, Beverly Smith and Beverly Smith, individually, v Betram Fields d/b/a The Granada Hotel, a/k/a Brooklyn Arms Hotel, Morris Horn, Merco Properties Inc. and Manny Krugman* (New York County Supreme Court; no index number is provided) (the Smith action), another action seeking damages for lead poisoning allegedly sustained at the Hotel; the deposition of Fields (conducted on April 3, 1987) in the action captioned *Sharon Stewart and Marvin Bussey v Betram Fields and Merco Properties, Inc.* (Kings County Supreme Court, Index No. 24316/85) (the Stewart action); the deposition of Fields (conducted on October 2, 1986), in the action captioned *Merco Properties v Betram Fields* (Kings County Supreme Court, Index No. 24908/86) (the Merco Action); affidavits dated October 2, 1986, October 11, 1988 and May 9, 1988 that Slattery submitted in the Merco action; an affidavit dated September 30, 1986 that Fields submitted in the Merco action; copies of reinspection notices dated October 2, 1984 and September 27, 1983 directed to Slattery and Merolla at the Hotel's address; Notices to Appear at Administrative Tribunal from the New York City Department of Health directed to Merolla at the Hotel and dated September 7, 8, 12, 13, 22, 1983; James' records from the Department of Health; an interoffice memo from Fields dated May 25, 1983; a letter from Fields to Merco dated March 27, 1984 which forwarded an order to show cause dated March 21, 1984 by HPD; and a report from the Albert Appraisal Company, Inc., dated July 26, 1984, which valued the building at $2,100,000 (the Appraisal Report).

At their 50-h hearings and depositions, plaintiffs testified that during the time that they resided in the Hotel, they observed paint chips falling in the two rooms that they occupied and in the hallways; that the condition of the paint worsened while they lived there; that the rooms had water leaks; that the bathroom ceiling in one of the rooms fell, exposing the pipes; that the walls had holes; and that no repairs were made and the walls were not painted, although they complained to the management staff at the Hotel. Plaintiffs further testified that they observed the infant plaintiffs eating lead paint chips and putting their hands and other objects that were covered with plaster dust in their mouths while at the Hotel. In addition, plaintiffs did not recall who paid their rent at the Hotel. As is also relevant herein, Lydia testified that none of the children at the Hotel slept in a crib; they all slept in the beds.

At her deposition, Perry testified that between 1982 and 1987, she was employed by the Colony South Brooklyn Houses. Perry's office was located on the second floor of the Hotel; offices for the New York City Department of Human Resources Crisis Intervention Services (CIS) and the Board of Education were located on the first floor. In describing the hallways and common areas of the Hotel, Perry said that there were:

> "deplorable conditions for the amount of money that the City was paying for residents to live in the hotel. The paint when I first started working there was chipping off the walls and different things like that. The paint in the apartment was not good paint, so there was always a problem with the paint peeling and what not. Just before I was – maybe a year before I left the hotel they had started to do some work there. . ."

In describing the conditions of the individual rooms, Perry explained that some people

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invested their own money to make sure that the rooms met their standards by, for example, painting or buying furniture. In some rooms, she saw "a lot of filth," while other rooms were "fixed up nice." She further noted that some of the rooms had leaks, which would cause the paint to peel.

Perry also testified that the rent for the people residing in the Hotel was paid by the New York Department of Social Services. The average stay for a family was supposed to be six months, but a family could stay anywhere from a year to more than three years; the CIS office would make appointments for residents who were at the Hotel to see apartments. In addition, Perry stated that she remembered Ruby Scott and some of her children. Perry did not believe that the management staff was concerned about lead poisoning, repairs or modernization, although lead poisoning was a big concern of the people who were employed by the Department of Health.

At his deposition, Merolla, Jr., testified that his father died in 1981, while conducting the business at the Hotel under the name of either the Granada Hotel or Merco Properties Incorporated. Merco operated the Hotel under a lease agreement that was executed in October 1966 with Fields; in 1980, Merco had one office located on the first floor of the Hotel. In 1981, Merolla, Jr., was working full time for a consulting firm and was helping his father out.

At his deposition, Jackson testified that he was formerly employed by Merco and by the South Brooklyn Health Center. In approximately 1980 or 1981, he began employment

with the Colony House as a caseworker; his office was located in the Hotel. He did not recall when he began working for Merco, but in approximately 1988, he became Slattery's executive assistant; he did not know Merolla or Merolla, Jr. and he never met Fields. When Jackson began his employment with Merco, he was the director of social services and acted as a liaison between management, the residents of the Hotel and the social service staff; he did not recall when he started to work for Merco.

When Jackson first came to the Hotel, Slattery had just taken over the building and "there was a lot of work that had to be done." He did not recall if the paint was peeling or if the rooms were painted, if any inspectors from HPD came to the premises, or how many families or children were residing in the Hotel. Jackson further testified that he was not aware of any children who were diagnosed with lead poisoning or of any violations being issued to the Hotel.

At his deposition, Philipoise testified that he began working as a desk clerk for Merco at the Grenada Hotel in 1972, when it was owned by Fields, leased to Merolla and run by Merco. He was promoted to the management staff during the time that Merolla worked at the Hotel; he also worked for Merolla, Jr. Philipoise further testified that in approximately 1980, the Hotel had a maintenance staff and at that time, the rooms were inspected when they were vacated, needed repairs were made, and the walls were scraped and painted if the paint was peeling; he opined that the condition of the Hotel was "all right." The City inspected the rooms every two weeks to a month; if a violation was found, the list was given to

management and the maintenance staff was sent to make the repairs. Philipoise recalled receiving a couple of lead paint complaints from HPD; the complaints were taken care of and the violation was corrected, although he did not remember the dates that the violations were received. Philipoise also stated that he was aware that there was a problem with lead paint, but he did not recall when the Department of Health or Department of Housing Preservation and Development (HPD) notified the Hotel of the problem. As soon as Merco was made aware of the violation, the walls were scraped and painted, as directed by the City. If the violation was sent in the mail, Merolla would know about it; Philipoise did not know if Fields got any information about the violations. The condition of the plumbing was good; if there was a leak, Slattery corrected the problem. Philipoise met Fields a few times, when he came to see Merolla; Fields had no role in taking care of the building and Philipoise did not see him go into any of the rooms.

At his deposition, Ross testified that in 1984, he was employed by the City as a supervisor in the Emergency Assistance Rehousing Program. He described the condition of the Hotel in th 1970's as “abominable” and he recalled that the hallways smelled of urine; he did not recall if he saw peeling paint.

At his deposition, Alan Fast testified that he joined the Bureau of Hazardous Substances in 1971 and he was employed as the director of special projects with the Lead Poisoning Prevention Program. He visited the Hotel as an inspector, supervisor and borough coordinator. Fast testified that he recalled that in complying with the repairs called for when

violations were issued, the Hotel "attempted to do the work part of the time and it took a while." Fast first became aware of a lead problem at the Hotel in the 1970's; he personally found lead paint violations prior to 1982, perhaps as early as 1970. He did not recall ever seeing a violation sent to Fields and he believed that violations were sent to the address of the Hotel; he further recalled dealing with Slattery and "Phil."

At his deposition in the Smith action, Slattery testified that he inspected the Hotel with Morris Horn, another owner of Merco, and Merolla, shortly before October 1983, when he purchased his 5% interest in Merco. At that time, the overall condition of the building was in disrepair, but he did not recall the condition of the paint. Slattery further stated that he was a vice president in the company and was employed to manage the Hotel from October 1983 until mid- 1989, when Merco went out of business and the lease for the premises was returned to Fields, who was the owner throughout the period. Commencing in October 1983, Slattery had an office in the lobby of the Hotel and he had general oversight of the staff. When Merco acquired the lease, it embarked on a general program of repair and renovation; the intent was to make every effort to bring the building up to code in order to encourage a higher degree of occupancy. In a relatively short period after acquiring the lease, within about six months, a majority of the repairs were completed, although not all of the rooms were painted by May 1984 and Merco did not keep any records of when a room was repainted.

Slattery further testified that most of the occupants of the Hotel at that time were

receiving public assistance; when a room was rented, HRA would telephone the Hotel to make the reservation and the person would arrive with a check from the City to pay for a two week period that was made out to the tenant and to the Hotel. On a day-to-day basis, Philipoise was responsible to see that the Hotel was cleaned, painted and maintained. No one was employed solely for the purpose of painting the building, although Slattery thought that "there were in excess of 50 to 75 employees." If violations were received by the Hotel, Slattery reviewed them and gave them to Philipoise, as it was the latter's responsibility to assign the repair work. Slattery further testified that the Hotel got lead paint violations during the period of October 1983 to May 1984; the violations pertained to more than one room. Philipoise was responsible for implementing corrective action when a violation was received.

At his deposition in the Smith action, Philipoise testified that he was employed in the Hotel for 18 years and had been the general manager since 1978. He explained that the name of the Hotel was changed from the Granada to the Brooklyn Arms in 1983, when Merco took over as the new manager. Horn and Slattery were owners of Merco; prior to October 1983, the owner of the Granada Hotel was Merolla. Fields did not participate in the management of the building during the time that Philipoise was employed as the general manager; Fields was at the building "a couple of times" during the ten year period commencing in 1978.

Philipoise further testified that he was responsible for renting rooms, collecting rent and making repairs. During 1982 to 1984, a general engineer was in charge of maintenance.

The Hotel maintained a logbook of people who complained about maintenance work, which was kept a couple of years. Prior to 1983, if any violations were issued, they went to Merolla, Jr.

When questioned about repairs and upkeep, Philipoise explained that before a family moved in, the room was painted; after the family moved in, the room was painted as necessary. Between February 1982 and April 1984, the Hotel employed six people as painters and another three or four as plasterers. The rooms were also inspected by "multiple city agencies" every three months; if work was necessary, the Hotel was notified and the violation was corrected right away. The Hotel's maintenance staff checked the rooms at least once a week. Philipoise thought that the Hotel received a lead paint violation for two rooms between march 1982 and February 1984.

At his deposition in the Stewart action, Fields testified that he was the landlord for Merco at the Hotel pursuant to a lease entered into in 1966. Fields did not know if the lease reserved any rights of re-entry into the premises and he believed that the lease required Merco to keep the property in good repair. Between 1966 and June 12, 1985, Fields did not enter the Hotel to make any repairs, either in person or by an agent. Fields was aware that the lobby of the Hotel had been redecorated within the last five years, but he had no financial or physical participation in the redecoration. During 1985, Fields was in the Hotel to meet with Horn with regard to the possible condemnation of the building by New York City; he did not believe that the condemnation had anything to do with violations.

At his deposition in the Merco action, Fields testified that he had been involved in investing in hotels since 1946. His responsibilities with regard to the Hotel was overseeing its operation; he operated the Hotel as a first class establishment from 1950 until 1960, when it was leased to Merco's predecessor. Merco took over in 1966 and Merolla was affiliated with Merco until his death in 1981 or 1982. Fields was advised that Merolla transferred or assigned the stock of Merco to Horn in 1983. After 1966, Fields visited the premises on an irregular basis; he maintained an office in connection with the Hotel at his home in Scarsdale, New York. Fields further testified that he collected clippings from newspapers with regard to the Hotel.

Fields also testified that beginning in 1972 to 1974, Merolla began to accept some New York City relocation clients. Fields knew, based upon his first hand observations, that between 1974 and 1983, the number of relocation clients increased and the condition of the Hotel was changing due to its constant use. He could not tell from his visits whether maintenance was regular, but the Hotel was not as well kept as it had been prior to 1972. Fields also testified that from time to time between 1974 to 1983, he was made aware that New York City violations had been placed on the property when he received copies in the mail; he would notify Merolla of the violations and demand that they be cured. Fields knew that the violations were corrected because of conversations that he had with Merolla, which conversations were usually by telephone; Fields would not go to the Hotel to inspect the building to determine if the violations had been corrected, nor would he contact the Building

Department. Fields did not inquire of Merolla whether the building received any violations that were not sent to Fields. Between 1974 and 1983, maintenance work was being done at the building, which was reflected in the annual statements of the Hotel. When Fields visited the Hotel between 1974 and 1983, he rarely visited or inspected the individual rooms.

Fields' testimony also established that shortly after he was notified that the stock of Merco had been transferred in October or November of 1983, he met with the new owner. At that time, Fields did not know if there were any outstanding violations from the City, but he did notice that the City was using lobby space. Prior to 1983, Fields was aware that the front door to the Hotel was missing; although Fields had many "rather heated" verbal communications with Merolla during which he demanded that the entrance door be replaced, it was not replaced until after Horn took over. From 1983 to August 1986, Fields continued to visit the premises on an irregular basis. During the first year and a half of Horn's tenure, Fields was at the Hotel more often because the two men were attempting to prevent the condemnation of the property. When he visited, Fields usually saw the common areas on the ground floor; "once in a great while" he visited other areas in the building. During 1983 to 1986, neither Fields nor anyone on his behalf inspected the Hotel.

In addition, Fields testified that prior to transfer of the lease to Horn, on August 22, 1983, he became aware of an article that appeared in the New York Time, headlined "Health Crisis Found by New York State at Two Hotels in the City" (the New York Times Article); the court is not provided with a copy of the article with the pleadings therein. The article

indicated that there was an infestation of rats in the building, that the building was dimly lit, that it had open garbage bags on the landings of many floors, and that paint was peeling from the walls; the article also made numerous references to the families and children who lived in the hotels. Fields testified, however, that he had no first hand knowledge of such conditions. Fields also testified that he did not know when he first read the article, he did not recall if he received any correspondence from the New York State Department of Health with regard to their inspection of the Hotel and Merolla did not advise him that the Hotel had been inspected. During his visits to the Hotel in 1985 and 1986, Fields saw many adults and children in and around the Hotel who he assumed were the relocation clients; during that period, Fields visited one or two rooms to check on the condition of the windows, since Merco had requested the right to replace them, at its expense.

A review of the affidavits submitted by the parties in the Merco action indicates that Merco commenced the action seeking a Yellowstone injunction in response to Fields' service of a notice to cure.[4] In his affidavit, Fields claimed that Merco was allowing the building to fall into serious disrepair, referred to several articles in the media that described the "deplorable" conditions at the Hotel and annexed copies of "hundreds of violations dating back to 1983." Field's papers also included exhibits referring to a multitude of violations, some of which referred to the need to paint, but none indicated the presence of lead based paint. In his affidavit, Slattery stated that 1,800 violations existed against the Hotel when

[4] The court has not been provided with a copy of the pleadings in the Merco Action.

ownership of Merco was transferred and that Merco had invested over $3 million to improve the Hotel. Slattery further contended that after Merco improved the property and increased its income, Fields was seeking to terminate the lease so as to regain possession of the now profitable Hotel; Slattery thus concluded that Fields was motivated by greed.

In his interoffice memorandum dated May 25, 1983, Fields noted that the physical condition of the Hotel remained terrible. Also relevant herein is the statement that:

> "[Merolla, Jr.] would not give me any specific figures about the relocation business but he stated that he has about 50 to 60 families in the hotel. I think this is an outright lie as it was a very warm day and I just checked the building from the outside. There were heads to be seen up to and including the 6th floor which leads me to believe that he may have close to 150 rooms occupied."

By letter dated March 27, 1984, Fields forwarded the order to show cause served upon him by HPD to Merco at the Hotel's address. Therein, HPD sought an order, pursuant to New York City Administrative Code § D26-53 and the Multiple Dwelling Law, ordering the correction of housing violations at the Hotel. The order to show cause listed approximately 80 outstanding violations against the Hotel.

As is also relevant herein, the Appraisal Report, which indicates that it was mailed to Fields at his Scarsdale home, described the Hotel as currently being used as a "[t]emporary residence facility for homeless persons and victims of building fires. . . . A two room suite on the second floor is being used for a day care facility." The Report went on to state that the structure exhibited "a degree of deferred maintenance including the requirement of

repainting and plastering."

The Law

With regard to plaintiffs' cause of action as it is premised upon common-law negligence:

> "absent controlling legislation, a plaintiff tenant in a lead-paint poisoning case raises a triable issue of fact as to common-law negligence sufficient to defeat a motion for summary judgment by a defendant landlord by offering evidence 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 (*see Chapman v Silber*, 97 NY2d 9, 15)."

(*Parra v Lopez*, 293 AD2d 458, 459 [2002]).

"Pursuant to Multiple Dwelling Law § 78, defendants [have] a nondelegable duty to keep the premises in good repair and, under Administrative Code of the City of New York § 27-2013 (h), to abate lead paint in apartments where children six years or under reside" (*Crespo v A.D.A. Mgmt.*, 292 AD2d 5, 11 [2002] [footnote omitted] [citations omitted]; *accord Cortes v Riverbridge Realty Co.*, 227 AD2d 430, 431 [1996] [defendant, as owner of the property, was charged with a nondelegable duty to keep the dwelling in good repair and to remove or cover lead paint therein]; *Morales v Felice Props.*, 221 AD2d 181, 182 [1995] [Multiple Dwelling Law § 78 and Administrative Code of the City of New York § 27-2013 (h) (1) impose nondelegable duties upon defendants-appellants to keep their

premises in good repair and to remove or cover lead paint therein]; *Nieves v 1097 Walton Realty Co.*, 220 AD2d 329 [1995] [Multiple Dwelling Law § 78 and Administrative Code of the City of New York § 27-2013 (h) impose nondelegable duties upon defendant to keep its premises in good repair and remove or cover lead paint therein]).[5]

It is now well settled that "[u]nder [the lead abatement provisions of the New York City Administrative Code], lead-based paint constitutes a hazard when two conditions are present: first, lead in an amount exceeding the stated threshold and second, a child of six years of age or under residing in the apartment" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646 [1996]. More specifically, New York City's lead abatement provision:

> "places a specific duty on landlords to abate lead paint in leased premises where children under the specified age reside (*see*, Administrative Code § 27-2013 [h]). It further establishes a 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 lead condition (*see*, Administrative Code § 27-2013 [h] [2]). Local Law 1 thus gives landlords authority to enter dwelling units occupied by such children for the very purpose of inspecting for and repairing a lead paint defect (*see also*, Administrative Code § 27-2008 [granting right of entry to repair and inspect premises in order to comply with code])."

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[5] Local Law 1 was repealed by the enactment of Administrative Code of the City of New York § 27-2056 et seq. (New York City Local Law No. 38 [1999]), effective November 12, 1999; Local Law 38 was deemed null and void by the Court of Appeals in *Matter of New York City Coalition to End Lead Poisoning v Vallone* (100 NY2d 337 [2003]), and thus, by operation of law, Local Law 1 was revived (*see O'Neal v New York City Hous. Auth.*, 4 AD3d 348 [2004]). Local Law 1 was initially enacted in January, 1982. It was in effect during a substantial portion of the period of exposure claimed in the action. The effective date of Local Law 1 was not raised in connection with the instant motion by any party.

(*Juarez*, 88 NY2d at 647).

"Since Local Law 1 confers upon the landlord the right to enter dwelling units occupied by such children to inspect for and repair a lead paint defect, a landlord will be charged with constructive notice of any lead paint hazard within an apartment that he or she knows is occupied by a child of the specified age" (*Moya v City of New York*, 2005 NY Slip Op 25292, 2 [2005], citing *Juarez*, 88 NY2d at 647; *Jiminez v City of New York*, 7 AD3d 268, 269 [2004] [defendant failed to rebut the presumption in Local Law 1 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 lead condition]; *Woolfalk v New York City Hous. Auth.*, 263 AD2d 355, 355-356 [1999] [it is well settled that a landlord who has notice of a child under seven years old living in one of its apartments is a landlord who has notice of any hazardous lead condition in that apartment causing injury to that child]; *Rivas v 1340 Hudson Realty*, 234 AD2d 132, 135-136 [1996] [a landlord with notice of an infant plaintiff's residence will be chargeable with constructive notice of the lead paint hazard in that particular unit, without regard to actual notice]; *see also Chadwick v Sabin*, 304 AD2d 603, 603-604 [2003] [in multiple dwellings located in the City of New York, constructive notice of a hazardous lead-paint condition is presumed where the landlord has notice that a child under the age of six resides in the unit]; *Velez v Stopanjac*, 273 AD2d 22 [2000] [partial summary judgment on the issue of liability was warranted under circumstances where defendants had notice that plaintiff moved into the subject apartment with four children, the

youngest being two years of age; the building was constructed before 1960; and defendants failed to properly inspect the apartment and take reasonable measures to alleviate the lead contamination]). Hence, "[g]iven the presumption, it [is] defendant's burden to show the absence of hazard, not plaintiff's to show its existence" (*Jiminez*, 7 AD3d at 269). Local Law 1, however, does not require landlords affirmatively to ascertain whether children six years of age or under reside in their buildings (*Juarez*, 88 NY2d at 646).

From this it follows that in order "[t]o meet its initial burden of demonstrating the absence of any triable issues of fact in a lead-poisoning case, a defendant must show that he or she had no prior actual or constructive notice of a dangerous lead-paint condition" (*Vidal v Rodriquez*, 301 AD2d 517, 518 [2003]). In addition, where "the plaintiff relies on actual notice as a basis of the owner's liability, mere proof of notice to a lessee would not suffice to constitute notice to the owner" (*Becker v Manufacturers Trust Co.*, 262 App Div 525, 527 [1941], *rehearing denied* 263 App Div 810 [1941]).

In determining whether the defendants herein are entitled to summary judgment, it must also be recognized that "a landlord's liability for injuries caused by defective or dangerous conditions upon the leased premises depends upon whether the lessor has retained sufficient control of the premises to be held to have had constructive notice of the condition" (*Brown v Marathon Realty*, 170 AD2d 426 [1991], citing *Hecht v Vanderbilt Assocs.*, 141 AD2d 696, 699 [1988], *appeal dismissed* 73 NY2d 918 [1989]; *Cherubini v Testa*, 130 AD2d 380 [1987]; *Silver v Brodsky*, 112 AD2d 213 [1985]). Thus, as a general rule, an

out-of-possession owner without the right or duty to enter and repair is not subject to liability for a subsequent injury resulting from a dangerous condition in the building (*see e.g. Tejada v City of New York*, 309 AD2d 676 [2003]).

Conversely, a landlord may be charged with constructive notice of defects in all those parts of the building into which, by authority of the written lease, he may enter (*see e.g. Tkach v Montefiore Hospital*, 289 NY 387, 390 [1943]). Accordingly:

> "retention in the lease of the right to enter the interior of an apartment to inspect the premises has sufficed to charge an out-of-possession landlord with constructive notice of a defect within the apartment (*see*, *Tkach v Montefiore Hosp.*, 289 NY at 389-390). Likewise, the right of entry conferred by Local Law 1 gives a landlord constructive notice of any lead paint hazard within an apartment that the landlord knows is occupied by a child of the specified age."

(*Juarez*, 88 NY2d at 647; *accord Briggs v Country Wide Realty Equities*, 276 AD2d 456, 457 [2000] [constructive notice could be found where an out-of-possession landlord reserved a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists]; *see generally Guzman v Haven Plaza Housing Development Fund Co.*, 69 NY2d 559 [1987] [when a landlord who is out of possession retains a right under the lease of re-entry to the premises, liability may be imposed, and it may be imposed irrespective of notice, since constructive notice is charged in such circumstances]).

It is equally well settled that in order for a managing agent to be held liable for an

injury resulting from a hazardous lead paint condition, the managing agent must have complete and exclusive control over the premises (*see Ramirez v City of New York*, 13 AD3d 248 [2004]). This general rule has been repeatedly applied in cases pertaining to the nonfeasance of the managing agent in lead paint violations (*see e.g. Guerrero v Djuko Realty*, 300 AD2d 542, 543 [2002], *appeal denied* 100 NY2d 501 [2003]; *German v Bronx United in Leveraging Dollars*, 258 AD2d 251, 253 [1999]; *see generally Ioannidou v Kingswood Mgt.*, 203 AD2d 248, 249 [1994] [the managing agent of the building in which the plaintiff was injured could be subject to liability for nonfeasance only if it were in complete and exclusive control of the management and operation of the building]; *Keo v Kimball Brooklands*, 189 AD2d 679 [1993]; *Gardner v 1111 Corp.*, 286 App Div 110 [1955], *affd* 1 NY2d 758 [1966]). In the alternative, liability may be found where the managing agent caused or created the dangerous condition, so that his or her action constitutes more than mere nonfeasance, but also affirmative acts of negligence (*German*, 258 AD2d 251, citing *Lennon v Oakhurst Gardens*, 229 AD2d 897, 898 [1996]; *Reliance Ins. Co. v Morris Assocs.*, 200 AD2d 728, 730 [1994]; *Jones v Archibald*, 45 AD2d 532, 535 [1974]). Hence, where the evidence demonstrates that the owner reserved a significant amount of control over the maintenance of the premises, the managing agent would not have a comprehensive agreement that displaces the responsibility of the owner such that it could be held liable to the plaintiffs (*see e.g. Hagen v Gilman Mgt.*, 4 AD3d 330, 331 [2004]).

Finally, a question of fact is raised as to whether a defendant had constructive notice

of a lead condition in a plaintiffs' apartment because they had actual notice of a lead condition in another apartment in the same building, since evidence of the condition in the other apartment would be admissible at trial (*Rodriguez v Amigo*, 244 AD2d 323, 324-325 [1997]; *accord Aldrich v County of Oneida*, 299 AD2d 938, 939 [2002] [there was a triable issue of fact with regard to whether defendant had constructive notice of a lead paint condition in plaintiffs' apartment arising from her actual notice of a lead paint condition in another apartment in the same building]).

Fields' Liability

Applying the above principles of law to the facts of this case, Fields has failed to establish entitlement to summary judgment. With regard to common-law negligence, Fields' alleged ignorance of his right to re-enter the Hotel to inspect and to make repairs is specious in view of the language contained in the lease, which unequivocally gives him such right. Moreover, the above discussion of Fields' deposition testimony establishes that he did, in fact, re-enter the Hotel to inspect the premises, albeit on an irregular basis. Similarly, it is beyond dispute that the Hotel was constructed prior to 1960, since Fields testified that he purchased the property in 1950 and that he operated it as a first class hotel commencing at that time.

In addition, the evidence before the court establishes that there are questions of fact with regard to whether Fields was aware that paint was peeling the Hotel. In this regard, Fields testified that he did inspect several rooms of the Hotel on occasion. Moreover, Fields

testified that during the period from 1974 to 1983, he was aware that New York City departments has issued violations against the building; the evidence before the court does not establish the content of those violations, which may have pertained to the presence of a lead paint hazard, since both Philipoise and Slattery testified that several such violations were received prior to 1984. In addition, Fields testified that he was aware of media coverage, including the New York Times Article that had been written about the Hotel in August 1983, which depicted the building as being in poor condition and made specific reference to patches of paint peeling from the walls; since Fields testified that he did not recall when he first read the article, an issue of fact exists as to whether he saw the article when it was published.

There is also an issue of fact with regard to whether Fields had knowledge that children under the age of seven were residing the in the Hotel. In this regard, Fields testified that in 1972 to 1974, he became aware that the Hotel was housing "relocation clients" for the City from his observations during his visits to the Hotel and as a result of his conversations with Merolla. Fields also testified that he observed children at the Hotel, though he did not recall if they were young. In addition, in his memo of May 25, 1983, Fields stated that he believed that as many as 150 rooms were filled by relocation clients, which further creates a question of fact as to whether he was aware that these clients included children. The New York Times Article, which Fields may have read as early as August 22, 1983, when it was published, also indicated the presence of children in the Hotel. Finally, Fields does not

address the issue of whether he was aware of the hazards of lead paint to young children (*see e.g. Munoz v Puretz*, 301 AD2d 382, 384 [2003] [given the conflicting affidavits, the issue whether defendants had actual or constructive notice that a child six years of age or under was living in one of its residential units was a question of fact for the jury]; *cf. Herrera v Persaud*, 276 AD2d 304, 305 [2000] [it was clear that defendants had notice that the infant plaintiff, seven years of age at the time of the alleged lead ingestion, resided in an apartment in defendants' multiple dwelling]).

For the same reasons, Fields has failed to establish entitlement to summary judgment dismissing plaintiffs' claims as they are premised upon alleged violations of the New York City Administrative Code and the Multiple Dwelling Law. As threshold issues, Fields does not contest plaintiffs' claim that paint was peeling from the walls of the Hotel that exceeded acceptable levels of lead. Further, as was noted above, his retention of the right of re-entry is sufficient to establish liability (*see generally Juarez*, 88 NY2d 628, 647; *Briggs*, 276 AD2d at 457). In addition, Fields' deposition testimony herein and in the Stewart and Merco Actions establishes that throughout the time that he owned the Hotel, he visited the premises, albeit on an irregular basis. More significantly, he testified that from time to time between 1974 and 1983, he was made aware that New York City violations had been placed against the Hotel; when he received a violation, he would demand that Merolla cure it.

In addition, as discussed above, issues of fact are raised with regard to whether Fields had knowledge that children under the age of seven resided in the Hotel, since Fields testified

that he was aware that the City was placing relocation clients in the Hotel and that children resided in the building in 1985 and 1986, although he did not recall the age of the children that he observed. In addition, the Appraisal Report that he received in March 1984 stated that a day care facility was operated on the second floor. Accordingly, there is no evidence to establish that he did not observe children under the age of seven at the premises during the relevant time period (*cf. Nwaru v Leeds Mgmt. Co.*, 236 AD2d 252, 253 [1997] [sufficient proof that defendants had actual notice that a child six years old or younger lived in the apartment was provided by the documentary evidence, consisting of window guard forms and the unrebutted deposition testimony of the child's father that he informed defendants' agents when he moved in that a child would be living in the apartment and that defendants' employees painted or repaired the apartment on several occasions in the presence of the child]; *see generally Munoz v Mael Equities*, 2 AD3d 118, 119 [2003] [summary judgment as to liability with respect to the injuries allegedly sustained by plaintiff by reason of lead exposure in his mother's apartment was properly denied, since there was a triable issue as to whether defendants had notice that a child under the age of seven lived in that apartment]).

Merco's Liability

Merco's motion for summary judgment must similarly be denied, since numerous issues of fact are raised with regard to whether Merco had complete and exclusive control over the Hotel and actual and/or constructive knowledge of both the existence of a hazardous lead paint in the building and the presence of children under the age of seven, which are

sufficient to warrant denial of its motion with regard to both common-law liability and violation of the controlling lead abatement provisions. As a threshold issue, Merco does not deny that the Hotel was constructed prior to 1960.

Further, with regard to the issue of control, the lease clearly placed responsibility for the maintenance of the Hotel, compliance with all laws and the correction of all violations upon Merco. Hence, Merco's claim that it did not have complete and exclusive control over the premises is unpersuasive. In addition, the deposition testimony of Slattery and Philipoise also establishes that Merco routinely received violations against the building and that, upon receipt, took the actions necessary to correct the problem, without advising Fields. As is also relevant, the deposition testimony of Fields, Slattery and Philipoise establishes that Fields was only at the premises occasionally and that he played no role in the day-to-day operations of the Hotel (*see generally Sauzo v Weiss*, 11 AD3d 220, 221 [2004], *stay denied* 2004 NY App Div LEXIS 14944 [2004] [defendant management company failed to establish that it ceased managing the building before the infant plaintiff's alleged exposure to lead paint; accordingly, it failed to satisfy its burden as summary judgment movant to demonstrate a prima facie entitlement to judgment as a matter of law]; *Santiago v Lease Realtors*, 304 AD2d 743 [2003] [the managing agent failed to sustain the burden of eliminating all issues of fact entitling them prima facie to summary judgment where they did not establish as a matter of law the capacity in which they were acting and the record remained unsettled as to whether they were merely employed by the corporate owner or were retained as independent

managing agents in complete and exclusive control of the management and operation of the premises]; *Guerrero*, 300 AD2d at 543 [defendant, as managing agent, was properly held to be jointly and severally liable for plaintiff's injuries since he was in complete and exclusive control of the management and operation of the apartment building]).

Further, the evidence before the court raises issues of fact with regard to Merco's actual and constructive notice of the existence of both peeling paint and lead paint violations in the Hotel. In this regard, both Slattery and Philipoise testified that they were aware that violations had been placed against the Hotel prior to 1985, so that both arguably had actual notice of the conditions. Philipoise's testimony further establishes that he was responsible for, and did, in fact, supervise the correction of the lead paint violations that were served on the Hotel. That the violations served prior to plaintiffs' tenancy may not have pertained to the specific unit in which plaintiffs resided is of no consequence, since actual notice of a lead condition in one apartment in the same building is admissible as evidence of the condition in another (*see generally Rodriguez*, 244 AD2d at 324-325; *Aldrich*, 299 AD2d at 939).[6] Further, Philipoise testified that he was aware of that lead paint could be dangerous to children and the City employees who testified further raise a question of fact as to whether the issue was discussed with Slattery, Merolla, and/or Merolla, Jr.

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[6] In this regard, the court further notes that in a decision dated June 12, 1997 and rendered in the Smith Action, the Honorable Alice Schlesinger held that plaintiff would be permitted to introduce evidence of eight lead based paint violations issued by the Department of Health to the Hotel as evidence of the issue the reasonableness of the action taken by the Hotel after learning of violations in other rooms.

In addition, the record clearly raises issues of fact as to whether Merco had knowledge that children under the age of seven resided at the Hotel. In this regard, both Slattery and Philipoise testified that they were aware that children were housed at the Hotel. Moreover, inasmuch as Merco's personnel maintained the desk at the premises and was responsible for registering the relocation clients sent by the City, it is patently incredible that Merco did not inquire as to the number of occupants of each room and their ages when they registered. Similarly, since Merco maintained a staff at the building, a question of fact is raised with regard to whether its personnel saw children coming in and out of the premises and/or that a child care facility was maintained on the second floor.

Accordingly, the defendants' motions to dismiss plaintiffs' cause of action as premised upon negligence and violation of the applicable lead abatement provisions are both denied.

Nuisance

The Parties' Contentions

In support of its motion, defendants argue that plaintiffs' claims, as premised upon nuisance, must fail since they are unable to prove intent, a necessary element. In opposition, plaintiffs argue that the conditions of the rooms occupied by plaintiffs "were so horrendous as to be dangerous to human life or detrimental to health, so as to be considered a private nuisance."

The Law

"To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2003], citing Restatement [Second] of Torts § 821D). In describing a private nuisance, it has been held that:

> "A private nuisance threatens one person or a relatively few (*McFarlane v City of Niagara Falls*, 247 NY 340, 344), an essential feature being an interference with the use or enjoyment of land (*Blessington v McCrory Stores*, 198 Misc 291, 299, *affd* 279 App Div 806, *affd* 305 NY 140). It is actionable by the individual person or persons whose rights have been disturbed (Restatement, Torts, notes preceding § 822, p 217)."

(*Copart Indus. v Consolidated Edison Co.*, 41 NY2d 564, 568 [1977], *rehg denied* 42 NY2d 1102 [1977]). Further, it is well settled that:

> "one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (Restatement, Torts 2d [Tent Draft No. 16], § 822; Prosser, Torts [4th equitable distribution], p 574; 2 NY PJI 653-654; *see Spano v Perini Corp.*, 25 NY2d 11, 15; *Kingsland v Erie Co. Agric. Soc.*, 298 NY 409, 426-427; *Wright v Masonite Corp.*, 237 F Supp 129, 138, *affd* 368 F2d 661, *cert den* 386 US 934)."

(*Copart Indus., id. at* 569). Hence, "[i]n the absence of negligence or intent, a cause of action to recover damages arising from a private nuisance cannot be maintained" (*State v Fermenta ASC*, 238 AD2d 400, 403-404 [1997], *appeal denied* 90 NY2d 810 [1997]).

Discussion

As argued by defendants in support of their respective motions for summary judgment, plaintiffs fail to establish the intent necessary to establish a cause of action sounding in nuisance. Defendants have not, however, made a showing that they were not negligent as a matter of law. Hence, plaintiffs' claims of nuisance will not be dismissed, since a claim of nuisance may also be premised upon a finding of negligence.

The court further recognizes, however, that it is well established that in maintaining a cause of action sounding in nuisance:

> "liability is based upon the interference with the use or enjoyment of land. In such a case, the plaintiffs must demonstrate their entitlement to monetary damages or injunctive relief. Where the injury is permanent, the measure of damages for private nuisance is the diminution of the market value of the property (*Kinley v Atlantic Cement Co.*, 42 AD2d 496; *Senglaup v Acker Process Co.*, 121 App Div 49), or where the injury is temporary, the reduction of the rental or usable value of the property (*Woolsey v New York El. R. R. Co.*, 134 NY 323; *Tom Sawyer Motor Inns v Chemung County Sewer Dist. No. 1*, 33 AD2d 720, *further app* 39 AD2d 4, *affd* 32 NY2d 775; *see* Prosser, Torts [4th equitable distribution], § 90, p 602)."

(*Guzzardi v Perry's Boats*, 92 AD2d 250, 254-255 [1983]; *see also Malerba v Warren*, 108 Misc 2d 785, 792 [1981], *modified on other grounds* 96 AD2d 529 [1983] [the measure of damages for the nuisance is the diminution in rental value or its usable value]).

From this is follows that plaintiffs may not recover damages sustained by reason of the infant plaintiffs' alleged lead poisoning as an element of damages recovering on a claim of nuisance. Accordingly, if plaintiffs are successful in obtaining a judgment finding that

defendant(s) created a nuisance at trial, their damages shall be so limited to the diminution in rental value of the rooms that plaintiffs occupied in the Hotel.

Breach of Warranty of Habitability

The Parties' Contentions

In support of their demand for summary judgment dismissing this claim, defendants argue that in order to establish liability pursuant to Real Property Law § 235-b, a plaintiff must establish privity of estate or privity of contract. Defendants thus conclude that since plaintiffs were placed at the premises by the City, the requisite privity is lacking. Defendants further argue that in order to establish liability, a plaintiff must also demonstrate that the landlord was given the opportunity to remedy the subject defect prior to imposing liability; plaintiffs here have made no such showing.

In opposition, plaintiffs argue that inasmuch as the condition of the Hotel was "not fit for human habitation" and the residents of the Hotel "were subjected to 'conditions which would be dangerous, hazardous, or detrimental to their life, health or safety,'" the trier of fact could find a violation of Real Property Law § 235-b. Plaintiffs further aver, in their opposition papers, that in the event that the court grants summary judgment dismissing their claim of breach of the warranty of habitability, plaintiffs should be permitted to continue their claim as proof of defendants' alleged negligence.

The Law

"By its terms Real Property Law § 235-b applies to written or oral leases or rental

agreements involving landlord-tenant relationships" (*Frisch v Bellmarc Mgt.*, 190 AD2d 383, 388 [1993]; *see also Visken v Oriole Realty*, 305 AD2d 493, 494 [2003], *appeal dismissed* 100 NY2d 639 [2003] [where no landlord-tenant relationship existed, Real Property Law § 235-d, which prohibits a landlord or a person acting on its behalf from engaging in a course of conduct intended to cause a tenant to vacate the premises, was inapplicable]; *Meldrim v Hill*, 260 AD2d 836, 838 [1999] [defendants' claims premised upon breach of the warranty of habitability presumed the existence of a landlord-tenant relationship, which was absent therein]).

As is also relevant herein:

> "[o]ne of the remedies that is available to a tenant for a landlord's violation of the warranty of habitability is an abatement of the rent, and the proper measure of damages is the difference between the fair market value of the premises if they had been as warranted and the value of the premises during the period of the breach."

(*Nostrand Gardens Co-Op v Howard*, 221 AD2d 637, 638 [1995], citing *Park W. Mgt. v Mitchell*, 47 NY2d 316 [1979], *cert denied* 444 US 992 [1979]). Hence, a cause of action for breach of the warranty of habitability is properly dismissed where plaintiffs never paid rent during the relevant period of time and defendant was not seeking to recover such rent (see *Young v GSL Enters.*, 237 AD2d 119 [1997]).

Further, "[t]here is no hint, either in the decisions that section 235-b was designed to codify, or the legislative history of that section, of any purpose to extend the doctrine of strict liability to landlords with regard to wrongs that had traditionally been an area of tort liability"

(*Curry v New York City Hous. Auth.*, 77 AD2d 534, 536 [1980]; *accord Richardson v Simone*, 275 AD2d 576, 577 [2000] [the warranty of habitability provisions permit a tenant to recover only limited economic loss and were not intended to provide a basis to recover damages for personal injuries]; *Barragan v Mathai*, 253 AD2d 508, 509 [1998] [a warranty of habitability claim is not an alternative cause of action to recover damages for personal injuries]; *Elkman v Southgate Owners*, 233 AD2d 104, 105 [1996] [damages for personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b]; *Carpenter v Smith*, 191 AD2d 1036 [1993] [Real Property Law § 235-b did not create a new cause of action in strict tort liability that permits a tenant to recover damages for personal injuries resulting from a breach of that warranty]).

Discussion

In the case at issue herein, defendants cannot persuasively deny that plaintiffs were tenants in the Hotel for a period of almost three years. Their demand for dismissal of the claim of breach of the warranty of habitability must therefore be predicated upon the fact that plaintiffs did not pay rent, since their rent was paid by the City. Defendants cannot succeed on this argument.

In so holding, the court is guided by the case of *Committed Community Associates v Croswell*, 250 AD2d 845, 846 [1998]), wherein the Second Department held that the:

> "Appellate Term properly affirmed the Civil Court's determination that the monetary basis for calculating the rent abatement found to be due the tenant because of the landlord's breach is the full contract rent, defined in the regulations as the

> sum a landlord receives both from HUD (or through public housing agencies) and from the tenant (*see*, 24 CFR 880.101 [c]), and which reflects the fair market value of the apartment (*see*, *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329, *cert denied* 444 US 992)."

(*id.* at 846). In so holding, the court implicitly rejected the contention that a tenant is precluded from asserting a claim premised upon a breach of the warranty of habitability under circumstances where a portion of his or her rent is paid by a government entity. From this it follows that such a claim will not be precluded on the grounds that all of the rent is paid by a government entity. In addition, plaintiffs raise an issue of fact with regard to whether their complaints to the manager with regard to the condition of the Hotel were ignored.

As was discussed above, however, the proper measure of damages in a case where a tenant claims a breach of the warranty of habitability is an abatement of the rent, measured by the difference between the fair market value of the premises if they had been as warranted and the value of the premises during the period of the breach. Hence, in a case commenced by plaintiff after her daughter was diagnosed with lead poisoning, it was held that plaintiff could not rely upon any alleged breach of the warranty of habitability to recover damages for personal injuries (*Joyner v Durant*, 277 AD2d 1014, 1014-1015 [2000], citing *Richardson v Simone*, 275 AD2d 576; *Stone v Gordon*, 211 AD2d 881; *Carpenter v Smith*, 191 AD2d 1036). This holding is controlling herein and in the event that plaintiffs succeed in establishing their claim of breach of the warranty of habitability at trial, their damages shall

be so limited.

Conclusion

The motions by defendants Fields and Merco are granted only to the extent of limiting any award that plaintiffs may recover pursuant to their claims of nuisance and breach of the warranty of habitability as discussed above. All other relief requested is denied.

The foregoing constitutes the order and decision of this court.

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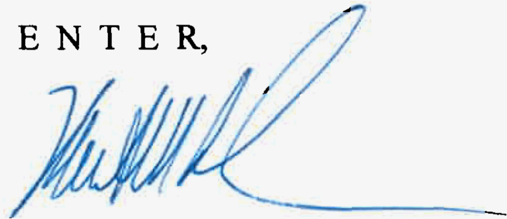

J. S. C.

Hon. Martin M. Solomon S.C.J.