

<b>Barker v 155 E. 51st St., LLC</b>
2007 NY Slip Op 34145(U)
December 3, 2007
Supreme Court, Kings County
Docket Number: 0022457/2003
Judge: Gloria Dabiri
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At an IAS Term, Part 39 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 3<sup>rd</sup> day of December 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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OMARI BARKER, AN INFANT UNDER THE AGE OF FOURTEEN YEARS,  
BY HIS MOTHER and NATURAL GUARDIAN, JACQUELINE BARKER  
and JACQUELINE BARKER, INDIVIDUALLY,

Index No. 22457/2003

Plaintiffs,

- against -

155 EAST 51<sup>ST</sup> STREET, LLC and MILLER MANAGEMENT,

Defendants,

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 _____
Opposing Affidavits (Affirmations) _____	2 _____
Reply Affidavits (Affirmations) _____	3 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants 155 East 51<sup>st</sup> Street, LLC (155 East) and Miller Management (Miller) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint on the ground that defendants did not have actual or constructive notice that a child less than seven years of age resided in the apartment where

the subject lead paint condition complained of by plaintiffs existed. Plaintiff Omari Barker, an infant, by his mother and natural guardian Jacqueline Barker (the infant plaintiff) and Jacqueline Barker, individually, (collectively plaintiffs) oppose the instant motion on the ground that issues of fact exist with respect to the defendants' alleged constructive notice of the subject lead paint condition which preclude the grant of summary judgment.

On or about June 18, 2003, the plaintiffs filed a verified complaint alleging that the infant plaintiff was exposed to a lead paint hazard while residing at 155 East 51<sup>st</sup> Street, Apartment 18A in Kings County and suffered injuries as a consequence thereof. The complaint alleges that the infant plaintiff resided at the premises since November 7, 2002 and that the defendants had notice of his residence. Plaintiffs allege negligence causes of action against defendant 155 East and Miller under the Administrative Code of the City of New York (former §2013(h)(1), [Local Law 1]).

In support of their motion for summary judgment, defendants supply lease agreements for the subject premises signed by plaintiff Jacqueline Barker on July 15, 2000 and February 14, 2002.<sup>1</sup> Neither lease indicates that a child would be living with her at the premises. The verified complaint states that the infant plaintiff began to reside in the apartment on November 7, 2002. Defendants also served plaintiffs with notice to admit that the infant did not reside in the apartment prior to November 7, 2002. However, plaintiffs

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<sup>1</sup>The lease dated July 15, 2000 is signed by Henderson Herbert and Jacqueline Barker. The lease dated February 14, 2002, although listing Mr. Herbert as a tenant is signed solely by Jacqueline Barker. Plaintiff's deposition testimony indicates that Mr. Herbert was a friend and did not reside in the apartment with plaintiffs.

have failed to either object or otherwise respond to the notice. Jacqueline Barker testified that the child lived in Trinidad prior to residing at the subject apartment. Defendants also submit evidence that the child was diagnosed with lead poisoning on November 13, 2002, six days after moving into the apartment. Jay Miller, a managing partner of 155 East, and a manager of Miller, in an affidavit states that defendants first became aware that a child under seven years of age was living in the apartment when they received a Commissioner of Health Order to Abate Nuisance, dated December 18, 2002. At his deposition, Mr. Miller testified that when visiting the apartment he had observed a sixteen or seventeen year old child, but did not recall ever seeing a young child.

Concerning the lead paint found in the apartment, the defendants supply the affidavit of Dionne Rivers-Ettu, an Associate Public Health Sanitarian and the individual who inspected the apartment after the infant plaintiff's blood-lead level was found to be elevated. When she inspected the apartment on November 26, 2002, "[t]he only component of the [p]remises that tested positive for lead . . . was the exterior door at the apartment entrance from the public hallway." The specific areas of the door which tested positive for lead were the door header on the interior of the door, the left casing on the exterior of the door and the upper center on the interior and exterior of the door. With respect to other areas of the apartment, she notes that "all the painted surfaces at the [p]remises . . . were in pretty good condition, meaning that they were intact." She also states that her notes from the inspection indicate that the infant plaintiff's grandmother provided her with information during the

inspection and that the response given to her with respect to the “Parent’s/Guardian’s Assessment of Possible Exposure” was that “Mom believes the poisoning came from Trinidad.” On January 14, 2002, and several times thereafter, Ms. Rivers-Ettu attempted to gain access to the apartment to determine whether the lead hazard had been abated, but was unable to do so. Ms. Rivers-Ettu inspected the apartment on April 3, 2003 and “observed that all of the violations had been complied with by the owner.”<sup>2</sup>

Defendants also submit a “Notification of Commencement of Lead Abatement” dated January 20, 2003, which includes information pertaining to the de-leading company retained by defendants to abate the subject lead condition.

Based on the foregoing, defendants argue that they have demonstrated, *prima facie*, that they had no prior knowledge that a child under the age of seven resided in the apartment, but that upon receipt of an abatement order they acted properly to remove the lead paint violations. Moreover, argue defendants, the time between when the child began residing in the apartment, November 7, 2002, and the date it was determined that he had an elevated blood-level, November 13, 2002, was only six days. This, defendants claim, did not afford sufficient time to learn of the child’s presence or to cure any lead hazard.

In opposition to the defendants’ motion, the plaintiffs submit the affidavits of Jacqueline Barker and the infant’s older sister, Natasha Richardson. Ms. Barker affirms, in

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<sup>2</sup>The New York City Department of Health and Mental Hygiene records indicates that on January 27, 2003 a home visit was attempted by a different Public Health Sanitarian, C. Amaro, and although entry was not made to the apartment it was observed that the apartment entrance door was replaced with a new door.

relevant part:

The entrance door [to the subject apartment] had chipping and peeling paint. The living room and bath room walls have chipping and peeling paint. The paint chips would fall to the floor. Since . . . I moved into the apartment there has always been chipping and peeling paint.

. . .

I have been a tenant in this apartment since July 2000. There has been a long history of deterioration, inadequate repairs and relapse. In 2001, the bathroom ceiling was saturated with liquid, which caused the ceiling to sag and the paint to peel. Eventually, the ceiling fell into the bathtub while I was taking a shower. The ceiling and peeling paint was repair[ed], however it was done inadequate[ly] because the peeling of the paint persist[s] to date.

On numerous occasions, I made oral complaints to the super and landlord about the peeling paint. Since 2000 to 2005, they came on approximately six occasions; about two of these occasions were prior to [the infant plaintiff] coming from Trinidad on November 7, 2002. They scraped the chipping paint then plastered and applied fresh paint to the area. . . .

After each repair the peeling and chipping paint condition would recur. At the time [the infant plaintiff] moved into the apartment the paint was peeling and chipping from the entrance door and the wall in the living room. I witnessed [the infant plaintiff] on numerous occasions eating paint chips and licking the door. Despite being reprimand[ed] he would persist.

. . .

In her affidavit, Ms. Richardson states, in part:

I observed [the infant plaintiff] eating paint chips within the first week of being in the apartment. The paint was peeling from the door and the walls in the living room and the bathroom. I also observed him sticking gum to the door and removing the gum and placing it back in his mouth. I would tell him to remove the gum and the paint chips from his mouth.

I cannot remember the name of the gentleman who was the super in our building during November of 2002 . . . he was an Hispanic gentleman . . . who lived on the first floor. During the first week that [the infant plaintiff] was in the apartment, the super was in and out of the apartment because at the time we had a leak under the sink and he came to fix it. He was aware that [the infant plaintiff] was present in the apartment because he saw him when he came to fix the leak.

I also know that the super was aware that children were living in the apartment because . . . during the days after [the infant plaintiff] came to live in the apartment, he used to play in the hallways. The super called our apartment and told us that the children could not play in the hallways. I recall the incident because we had a dispute with him and reminded him that his children also played in the hallways.

\* \* \*

I believe the defendants were negligent in the ownership and maintenance of the apartment, in that we had a continuous peeling and chipping paint condition in the apartment for years. They would scrape, plaster and repaint and the condition would return in a few months. This was an ongoing problem that was not resolved even after [the infant plaintiff] tested positive in November 2002 for [an] elevated blood lead level. The peeling paint contained lead and contributed to my brother's injuries.

Plaintiffs also submit the affirmation of licensed physician Dr. John F. Rosen, who reviewed Health Department, Board of Education and medical records and assessed the infant plaintiff on February 28, 2007. Dr. Rosen's affirms:

[The infant plaintiff] was diagnosed as having the disease of childhood lead poisoning at five years old. The initial diagnosis dated November 13, 2002, was 30 ug/dl. His disease spanned a period of approximately two and a half years, at the very least. Concurrent with his disease of lead poisoning, [the infant plaintiff] lived at 155 East 51<sup>st</sup> Street, where the DOH documented lead based paint violations in November 2002. [The infant plaintiff's] disease was caused by ingestion of lead based paint at his home, and he lived in this home environment for a sufficient period of time to have a BPb of 30 ug/dl.

In addition, the plaintiffs submit the affidavit of Marc Rutstein, the president of Environmental Consulting and Management Services, Inc., a company which provides “comprehensive lead paint inspections, testing, risk assessments, monitoring and consulting services.” In the affidavit, Mr. Rutstein states, in relevant part, that:

[A] [p]aint chip sample from the living room of 155 East 51<sup>st</sup> Street, Apartment 18A, Brooklyn NY was submitted to my office for lead-based paint testing.

On September 23, 2005, the sample was sent to EMSL Laboratories for analysis via Flame Atomic Absorption. On September 24, 2005, the analysis found that the sample from the living room of 155 East 51<sup>st</sup> Street, Apt 18A contained lead concentrations of 1.00% by weight. Applicable regulatory guidelines provide that lead concentration above 0.5% by weight is “Positive” or “Lead Containing”.

Given the presence of lead concentrations of 1.00% by weight and if a child were to be exposed to this painted surface and if the surface was in disrepair, then a possibility might exist whereby the presence of lead paint within the child’s environment might have contributed to or solely caused the elevated blood lead condition to occur.

In a letter sent by Mr. Rutstein to plaintiffs’ counsel, dated September 27, 2005, Mr. Rutstein states that “following receipt of the referenced paint chip,” said paint chip was sent for analysis and that such chip was found to be “Lead Containing.” Mr. Rutstein also describes the paint chip as having its origin in an “Interior Door Casing/Frame.”

Based upon the foregoing, the plaintiffs contend that triable issues of fact exist with respect to whether the defendants had notice of both the infant plaintiff’s residency in the apartment and the presence of a lead paint hazard within same, but nonetheless failed within a reasonable time to correct such condition.

## DISCUSSION

Summary judgment should only be granted where there are no triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). In order to prevail on a motion for summary judgment, the movant must present a *prima facie* case demonstrating entitlement to judgment as a matter of law (*Prince v Di Benedetto*, 189 AD2d 757, 759 [1993], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has established his or her *prima facie* case, the party opposing the motion bears the burden of “produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Stated differently, “the plaintiff must establish the existence of material facts of sufficient import to create a triable issue” (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975], citing CPLR 3212[b]). In addition, the evidence presented on summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*Sillman v Twentieth Century Fox Corp.*, 3 NY2d at 404). Because summary judgment is a drastic remedy, it should only be awarded when there is no doubt as to the non-existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). Moreover, “[i]t is well established that negligence cases do not generally lend themselves to resolution by summary judgment, since that remedy is appropriate only where the negligence or lack of negligence of defendant is established as a matter of law” (*Ugarriza v Schneider*,

46 NY2d 471, 474 [1979]). Summary judgment is appropriate, however, even in negligence cases, where the movant satisfies his or her initial burden of proof and the nonmovant's opposition to the motion for summary judgment is "entirely conjectural and there is no genuine issue [of fact] to be resolved" (*Cassidy v Valenti*, 211 AD2d 876, 877 [1995], citing *Andre v Pomeroy*, 35 NY2d 361 [1974]; see also *Shaw*, 28 NY2d at 207).

With respect to personal injury actions premised upon the alleged exposure of a child under the age of seven to a lead paint hazard, the Administrative Code of the City of New York § 27-2013(h)(1), ["Local Law 1"]<sup>3</sup>, imposes a nondelegable duty upon the owner of a multiple dwelling to remove or cover any paint or similar surface-coating material containing a lead level in excess of that set by the Code "in any dwelling unit in which a child or children six (6) years of age and under reside" (see *Juarez v Wavecrest Mgmt. Team*, 88 NY2d 628, 642 [1996], quoting Local Law 1; see also *Chapman v Silber*, 97 NY2d 9 [2001]). Under common-law negligence a landlord may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to make such repairs (*Chapman v Silber*, 97 NY2d at 19, citing *Worth Distribs. v Latham*, 59 NY2d 231, 239 [1983]). Alternatively, such duty may be imposed by statute. As is relevant here, the City of New

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<sup>3</sup>In 1999, the lead paint provisions of Local Law 1 were modified and placed in a new section, Administrative Code, Article 14, Section 27-2056.1 - 2056.10. However, on July 1, 2003, the Court of Appeals struck down the New York City 1999 lead paint abatement law, effectively reinstating Local Law 1 (see *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337, 351 [2003]).

York has enacted legislation that requires landlords to remove lead paint hazards under certain circumstances by enacting Local Law 1 (*see Chapman*, 97 NY2d at 19). Pursuant to Administrative Code § 27-2013(h)(2), in any multiple dwelling erected before January 1, 1960, where a child six years of age or under reside and paint is peeling, it is presumed that such paint contains more than the proscribed maximum lead level.

In *Juarez*, the Court of Appeals analyzed Administrative Code § 27-2013(h) and held that liability may be imposed upon a landlord for injuries to a child caused by a lead hazard only where the landlord had actual or constructive notice of both (a) a hazardous lead condition, in excess of the statutory minimums, in an apartment located in a building built before 1960, and (b) that a child six years of age or younger resided therein (88 NY2d at 646). *Juarez*, however, did not require that the landlord have actual notice of peeling paint in the apartment (*id.* at 638-639). Rather, where a landlord has notice that a child under seven is residing in such an apartment, Local Law 1 provides for constructive notice of the hazardous lead condition [Admin. Law § 27-2013(h)(1)]. “[T]he landlord’s liability depends purely and simply on whether it had notice of a child under seven living in the apartment, and when the building was built[;] . . . [the issue of] whether the landlord had actual notice of peeling paint or other indications of a hazard are immaterial” (*Woolfalk v New York City Hous. Auth.*, 263 AD2d 355, 356 [1999]; *see also Velez v Stopanjac*, 273 AD2d 22, 22 [2000]; *Cartagena v Tang*, 260 AD2d 337, 338 [1999], *Nwaru v Leeds Mgmt. Co.*, 236 AD2d 252, 253[1997], *abrogated by statute on other grounds as recognized in Rangolan v*

*County of Nassau*, 96 NY2d 42 [2001]; *Rivas v 1340 Hudson Rlty. Corp.*, 234 AD2d 132, 135 [1996]).

Thus, under Local Law 1 “a landlord who has notice of a child under seven years old living in one of its [pre-1960, multiple dwelling] apartments is a landlord who has notice of any hazardous lead condition in that apartment causing injury to that child” (*Woolfalk*, 263 AD2d at 355; *Juarez*, 88 NY2d at 648, [“If . . . (the landlord) had knowledge that a child under seven resided in the apartment, it may be charged with notice of the lead hazard prior to receipt of the Order (to Abate Nuisance)”]; see also *Velez*, 273 AD2d at 22; *Miller v 135 Rlty. Assocs.*, 266 AD2d 112, 113 [1999]; *Woolfalk*, 263 AD2d at 356; *Cartagena*, 260 AD2d at 338; *Nwaru*, 236 AD2d at 253). If a landlord is found to have had the requisite notice of the residency of the infant and a lead paint hazard exists in the apartment, the landlord’s liability then turns on the reasonableness of its efforts to remedy the lead condition (*Juarez*, 88 NY2d at 644). In addition, the plaintiff must demonstrate that the child’s lead poisoning is connected to the dangerous lead paint condition in the subject apartment (*id.* at 648).

While a landlord will be deemed to have constructive notice of a hazardous lead condition once it has actual or constructive notice that a child under seven resides in an apartment constructed prior to 1960, Local Law 1 does not require a landlord to “affirmatively . . . ascertain whether children six years of age or under reside in their buildings” (*Juarez*, 88 NY2d at 646). “[T]he City Council did not intend to charge landlords with the responsibility of determining whether young children reside in any of their dwelling

units” (*id.* at 647).

When actual notice of a child’s residency has not been provided to the landlord, questions of fact concerning the landlord’s constructive notice of same may be raised where the superintendent of the building, or other employee of the landlord, is aware of the child’s residency (*see Peri v City of New York*, 44 AD3d 526 [2007] [question of fact existed as to the municipal landlord’s notice of residency of infant plaintiffs in the apartment of a building consisting of 20 units, where the superintendent was familiar with plaintiffs from the first period of occupancy and throughout different periods of same]; *Ibert v Tuscan Assocs.*, 37 AD3d 194, 195-196 [2007] [question of fact as to landlord’s notice of child’s residency where lease provided that the infant’s mother would be residing in the apartment with her immediate family, the child lived in the apartment all of his life, current landlord retained the former owner’s superintendent after purchasing the building and “it [could] reasonably [be] inferred that the superintendent of [the] 26-unit building knew that the child was living in the apartment with his mother”]; *Munoz v 42 Holding Corp.*, 30 AD3d 361, 361-362 [2006] [question of fact existed as to landlord’s notice of residency of child under seven in apartment where the superintendent made multiple repairs to the apartment and resided on the same floor as the infant plaintiff]). However, where the contact between the child and the superintendent or other employee is limited and knowledge of the child’s residence therefore cannot readily be inferred, such contact is inadequate, without more, to raise a triable issue of fact as to the owner’s notice (*see Worthy v New York City Housing Auth.*, 18

AD3d 352, 352 [2005] [affirming grant of summary judgment to municipal landlord and finding record insufficient to support inference that the landlord had notice that a child under the age of seven resided in the subject apartment where its records did not indicate that a child under seven resided therein and plaintiff's evidence of constructive notice was limited to alleged occasional observation of the infant by various employees of landlord while the infant was in the company of his aunt, the tenant of record]).

In this case, defendants have demonstrated *prima facie* that they did not have actual or constructive notice of the infant plaintiff's residency in the apartment prior to receipt of the December 18, 2002 abatement order, and plaintiffs have failed to raise a triable issue in opposition. Defendants' proffered lease agreements do not indicate that anyone other than Jacqueline Barker resided in the apartment. In addition, Mr. Miller affirms that defendants had no notice that a child was residing in the apartment until they received the December 18, 2002 order. Defendants also submit Jacqueline Barker's deposition testimony in which she states that she did not inform the defendants that the infant or his older brother would be residing at the apartment. Defendants further point out that according to the plaintiff the infant initially sustained injuries sometime during his first six days in the apartment, and that six days provided insufficient time in which the defendants could have acquired constructive notice of the child's presence or remedied any hazard.

Although Jacqueline Barker affirms that the apartment had a history of chipping and peeling paint which necessitated several repairs, the defendants' notice of such condition is

insufficient absent evidence that they also were aware that a child under the age of seven resided in the apartment (*see Woolfalk*, 263 AD2d at 356). Similarly, while Ms. Barker's affidavit and deposition testimony that the infant plaintiff ate paint chips and licked the exterior door during his first week in the apartment, and Dr. Rosen's opinion that the infant plaintiff "lived in this home environment [in the subject apartment] for sufficient time to have a BPb of 30 ug/dl," may raise issues of fact with respect to causation, they do not raise a material factual issue with respect to the crucial threshold issue of notice. Indeed, as noted by defendants, Ms. Barker stated at her deposition that she never informed the defendants that the infant and his older brother would be moving into the apartment prior to, or at the time of, their arrival in November 2002.

Ms. Richardson affirms that the superintendent was "in and out of the apartment" to fix a leaking sink during the first week and "was aware that the infant plaintiff was present in the apartment because he saw him when he came to fix the leak." Ms. Richardson further states that the superintendent was aware that children were living in the apartment "because . . . during the days after [the infant] came to live in the apartment, he used to play in the hallways [and] [t]he super called our apartment and told us that the children could not play in the hallways."

However, these limited and discrete instances, without more, are insufficient to infer that the superintendent was aware of the infant's presence as a resident in the apartment. Given the abbreviated time frame during which the infant is alleged to have sustained his

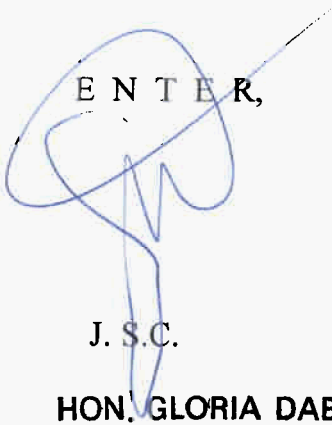
injuries, the evidence of constructive notice adduced by plaintiffs fails to rise above mere speculation and conjecture. The mere observation of the child in the apartment on an unspecified, limited, number of occasions, within such a short time frame, does not establish constructive notice by the defendants of the child's residency. In addition, there is no indication in Ms. Richardson's affidavit as to when the superintendent allegedly called to complain about "the children" playing in the hallways. Rather, she avers that it occurred "during the days after the [infant plaintiff] came to live in the apartment."

Plaintiffs also contend that the infant suffered a continuing injury due to a lead condition in the apartment persisting after the claimed abatement. However, the defendants demonstrated that upon receipt of the December 18, 2002 order, they commenced lead abatement within approximately a month. Defendants also provide the affidavit of Ms. Rivers-Ettu that upon her re-inspection of the apartment, all lead violations previously found therein had been corrected.

In opposition, plaintiffs proffer the affidavit of Mr. Rutstein who avers that a paint chip allegedly obtained from the living room of the subject apartment "was submitted" to his office on or about September 23, 2005 and found to be "lead containing." As Mr. Rutstein himself did not collect the sample, his statements as to where the chip came from and when it was collected are conclusory. Thus, while the defendants had notice that a child was residing in the apartment during 2005, their *prima facie* demonstration that no lead condition existed in the apartment subsequent to the abatement of the 2002 violations remains

unchallenged by plaintiffs (*cf. Ibert*, 37 AD3d at 196 [question off fact existed as to whether lead hazard remained after initial abatement where there were conflicting reports based upon inspections of the apartment by the relevant governmental agencies]). Accordingly, it is

ORDERED, that the defendants' motion for summary judgment is granted and the complaint is dismissed.

A handwritten signature in blue ink, appearing to be 'Gloria Dabiri', is written over the typed name. The signature is stylized and loops around the text.

E N T E R,  
J. S.C.  
HON. GLORIA DABIRI