Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

PEDRO RODRIGUEZ, an infant under the age of fourteen years old by his mother and natural guardian, RAMONA RODRIGUEZ, and MARIA RODRIGUEZ, an infant under the age of fourteen years old, by her mother and natural guardian, RAMONA RODRIGUEZ, and MARLENE RODRIGUEZ, an infant under the age of fourteen years old, by her mother and natural guardian, RAMONA RODRIGUEZ, Plaintiffs, -against- NONGYAW TRAKANSOOK, Defendant.	Index No. 8493/00 Motion Date May 13, 2008 Motion Cal. No. 19 Motion Sequence No.3

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Notice of Motion-Affidavits-Exhibits.....	1-5
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Upon the foregoing papers it is ordered that the branch of defendant's motion for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' Complaint is hereby granted.

Infant-plaintiffs Pedro Rodriguez, Maria Rodriguez, and Marlene Rodriguez by their mother and natural guardian, Ramona Rodriguez, commenced this action to recover for injuries allegedly sustained by infant-plaintiffs from exposure to lead paint at the premises located at 104-53 48th Avenue, Corona, New York, which premises were owned by defendant Nongyaw Trakansook and in which premises plaintiffs resided (in an apartment on the second floor) pursuant to a lease agreement, from June 1992 to July 1994.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]. The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (s*ee, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

To establish that an owner is liable for a lead paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition (*Chapman v. Silber*, 97 NY2d 9 [2001]; *Batts v. Intrebor, Inc.*, 297 AD2d 692 [2d Dept 2002]; *Vazquez v. Prevosto*, 300 AD2d 299 [2d Dept 2000]).

Defendant moves for summary judgment, arguing that she cannot be held liable to plaintiffs since: plaintiffs cannot establish that the alleged hazard existed in the subject apartment at the time when plaintiffs resided at such premises; defendant did not receive actual notice of the alleged defect; defendant did not receive constructive notice of the alleged defect; and plaintiffs did not suffer any lasting physical or cognitive injuries stemming from the alleged lead poisoning.

Defendant presented a *prima facie* entitlement to summary judgment (s*ee, Vidal v. Rodriguez*, 301 AD2d 517 [2d Dept 2003]). Defendant submits sufficient evidence to demonstrate that she had neither actual nor constructive notice of the alleged dangerous condition in the premises. In support of the motion, defendant submits: the pleadings, deposition transcript testimony of the parties, unsworn medical records and narrative reports, an article on lead poisoning issued by the Department of Labor of Massachusetts, an attorney's affidavit, and defendant's own affidavit. In order to prove that she did not have actual notice

of a lead-paint condition, defendant presents deposition testimony of the infant-plaintiffs' mother, Ramona Rodriguez which testimony indicates that the only complaints Ms. Rodriguez remembered making to Ms. Trakansook regarding her tenancy in the building were regarding the electricity. Defendant also presents the deposition testimony transcript and affidavit of defendant herself wherein she asserts that she never received any notice of any lead poisoning violations in plaintiffs' apartment and that she never received any complaints from the Rodriguez family about lead hazards in the subject apartment. Furthermore, defendant submits sufficient evidence to demonstrate that she had no constructive notice of the lead-paint condition in the subject premises. Defendant submits sufficient proof to establish that she cannot be charged with constructive notice pursuant to the Administrative Code of the City of New York since the building is not a multiple dwelling (*Vazques, supra, citing Juarez v. Wavecrest Mgt. Team*, 88 NY2d 628) and that she cannot be charged with constructive notice pursuant to case law either. Accordingly, as defendant submits sufficient evidence to demonstrate that she had neither actual nor constructive notice of the alleged dangerous condition in the premises, defendant established her *prima facie* case entitlement to summary judgment.

Plaintiffs failed to raise a triable issues of fact *(see, Smith v. Saget*, 258 AD2d 641 [2d Dept 1999]). In opposition to the motion, plaintiffs submit: an attorney's affirmation, an affidavit of the infant-plaintiffs' mother, Ramona Rodriguez, photographs of the apartment, an Order to Abate Nuisance Notice dated July 14, 1994, case law, a Certificate of Occupancy Report, several medical affirmations of James M. Liguori, M.D., and an article published for the Centers for Disease Prevention and Control pertaining to lead paint. In order to raise a triable issue of fact, "absent controlling legislation, a triable issue of fact is raised when a plaintiff shows that the landlord (1) assumed a right of entry to the premises and assumed a duty to make repair, (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." (*Chapman v. Silber*, 97 NY2d 9 [2001]). Regarding the first prong, infant-plaintiffs' mother argues that defendant testified that she went to plaintiffs' apartment during plaintiffs' tenancy about two times a year and that she herself (Ms. Rodriguez) testified that she noticed peeling paint and made complaints, but that no repairs were ever made. Such evidence does not establish that the landlord assumed a right of entry to the premises or assumed any duty to make repairs, and plaintiffs fail to allege that the lease imparted any such duties. In her affidavit, defendant states that she "did not retain the right to enter the premises and went to the house a total of five times in the three years when [she] was

called by Mr. Rodriguez to come and pick up the rent money. Sometimes [she] sent her sons to pick up the rent money, however, they always waited outside and never entered the premises. [She] had no key to the premises." As such, the first prong has not been met. Additionally, plaintiffs have failed to establish that the third prong, that defendant "was aware that paint was peeling on the premises," has been met. Ramona Rodriguez, in her opposition papers to the instant motion dated states in her own affidavit dated March 4, 2008 that she herself "did observe peeling paint throughout the apartment and did make complaints to the defendant/landlord." However, in her examination before trial transcript testimony sworn to on October 20, 2007, Ms. Rodriguez was asked if during the time she lived in the apartment, she made any complaints to the defendant about the apartment, and Ms. Rodriguez answered: "No, but —yes, as far as the electricity." Also, when Ms. Rodriguez was asked at the examination before trial if she made any other complaints to defendant about her tenancy in the building," Ms. Rodriguez answered: "I don't remember." To the extent that Ms. Rodriguez's affidavit in opposition states she did make complaints to defendant regarding the peeling paint in the apartment, "it presented a feigned issue of fact designed to avoid the consequences of [her] earlier deposition testimony, and thus was insufficient to defeat the defendant's motion" (*Karwowski v. New York City Transit Authority*, 844 NYS2d 96, 97 [2d Dept 2007] [internal citations omitted]; *see also, Zylinski v. Garito Contracting*, 702 NYS2d 86 [2d Dept 2000] [holding that a plaintiff "'cannot create a triable issue of fact by making statements in an affidavit which completely contradict [her] prior sworn testimony without offering any explanation for the contradiction[s],'" *citing Gantt v. County of Nassau*, 234 AD2d 338, 229]). As such, the third prong has not been met. Furthermore, the fourth prong has not been met, in that plaintiffs have not established that defendant knew of the hazards of lead-based paint to young children. While plaintiffs claim that defendant testified at her deposition that just prior to the plaintiffs moving into the apartment, she painted the apartment with oil based paint and therefore she recognized that lead paint was injurious to infants, such reasoning constitutes mere speculation. It cannot be said that just because the apartment was painted with oil based paint just prior to the plaintiffs moving in, that defendant necessarily knew of the hazards of lead-based paint to infants. The defendant could have painted the apartment with oil based paint for any number of reasons, and so the fourth prong has not been met.

Additionally, plaintiffs' photographic submissions are insufficient to create a triable issue of fact. Infant-plaintiffs' mother, Ramona Rodriguez's affidavit asserts that the photographs attached to the opposition papers depict the condition of the apartment from the time she moved in, June 1992

through the time she moved out, July 1994, namely, the peeling and chipping paint. However, the Court notes that "even the existence of peeling and chipping paint does not provide constructive notice of a lead paint hazard (*citation omitted*)" (*Stover v. Robilotto*, 277 AD2d 801, 803 [3d Dept 2000]; *see also, Durand v. Roth Bros. Partnership Co.*, 265 AD2d 448, 449 [2d Dept 1999] [holding that "notice of chipping and peeling paint is not the equivalent of notice of a dangerous lead paint condition]).

Accordingly, summary judgment is granted in favor of defendant and plaintiffs' Complaint is dismissed.

As plaintiff's Complaint has been dismissed, all remaining branches of the motion are rendered moot.

The foregoing constitutes the decision and order of this Court.

Dated: July 9, 2008

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Howard G. Lane, J.S.C.