

Florian-Galvan v RBT Prop. Assoc., LLC

2008 NY Slip Op 32942(U)

October 10, 2008

Supreme Court, New York County

Docket Number: 111035/03

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING

PART 49

Index Number : 111035/2003
FLORIAN, ALEX
 vs.
RBT PROPERTY ASSOCIATES
 SEQUENCE NUMBER : 007
 DISQUALIFY COUNSEL

INDEX NO. _____
 MOTION DATE 7/2/08
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

1 this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with annexed decision*

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

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OCT 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/08

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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
MELISSANDRA FLORIAN-GALVAN, an infant and
ALEX FLORIAN an infant by their mother and natural
guardian, ERMIDA GALVAN and ERMIDA GALVAN,
Individually,

Index No. 111035/03

Plaintiffs,

DECISION AND ORDER

-against-

RBT PROPERTY ASSOCIATES, LLC, and 96
WADSWORTH, LLC

Defendants.

-----X
This action is to recover for personal injuries sustained by the infant Plaintiffs
MELISSANDRA FLORIAN-GALVAN, and ALEX FLORIAN, and a derivative claim on
behalf of their mother, ERMIDA GALVAN ("Plaintiff"), as a result of the alleged negligence
committed by the Defendants RBT PROPERTY ASSOCIATES, LLC ("RBT"), and 96
WADSWORTH, LLC ("96 WADSWORTH"), their agents, servants, and/or employees from
approximately June 24, 2000 up to and including the present. Plaintiffs claim that during this
time period, the infant Plaintiffs were allegedly caused to ingest and/or inhale lead particles,
contaminants and/or dust due to the use and/or presence of lead based paint and paint chips in
their residence at Apartment 2-A ("the apartment") at 96 Wadsworth Terrace ("the building"),
New York, New York.

Plaintiffs claim that as a result of said ingestion and/or inhalation, the infant plaintiffs
sustained severe and permanent injuries. Plaintiff alleges that infant plaintiffs MELISSANDRA
and ALEX sustained permanent injuries and damages to the brain, blood, kidney, reproductive,
gastrointestinal, neurological and nervous systems; and have been rendered sick, sore, lame and
disabled. Specifically, infant Plaintiffs allegedly suffered severe stomach pain, loss of appetite,

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delayed speech and language development, difficulty in concentration, poor attention span, distractibility, poor articulation and vocabulary, slurred speech, temper tantrums, excessive impulsiveness, hyperactivity, intellectual impairment, learning disability, fidgetiness, attention deficit disorder, traumatic anemia, restlessness, irritability, poor impulse control, headaches, damage, atrophy, and dystrophy of the nerves, blood vessels and cells, with functional and/or organic disturbances and tissue damages, mental retardation, developmental delay, vomiting, graphomotor dyspraxia, separation anxiety disorder, organic psychosis, aggressiveness, visual and auditory problems, sensitivity to violence, anger, adjustment disorder with disturbance of emotions and conduct, organic mental disorder with perceptual, language and academic deficit, abnormal lead levels in blood, emotional disturbance, abdominal pain, paranoia, and impaired hearing.

Due to these injuries, Plaintiff alleges the children have been unable to pursue their usual duties, activities, and recreational activities; that they have been confined to their beds and home for some time; that they have suffered physical and mental pain, and emotional distress; and that they have and will sustain a loss of enjoyment, pleasures and pursuits of life. In addition, Plaintiff alleges that MELISSANDRA and ALEX have been compelled to submit themselves to the hospital and physicians in an attempt to alleviate said injuries, for which various sums of money have been and will continue to be incurred.

Plaintiff ERMIDA GALVAN's also claims a cause of action in addition to those of each of her children. ERMIDA claims that by reason of defendant's alleged negligence and carelessness, the Plaintiff has been and will continue to be deprived of the services, society, companionship and support of her son and daughter, and will be compelled to incur and/or expend various sums of money for hospital and medical expenses on their behalf, including

[* 4]

physician and medication costs. Plaintiff ERMIDA GALVAN will incur these costs while suffering the damage of future lost earnings of her children.

Plaintiffs also maintain that Defendants were negligent in permitting and allowing the infant plaintiffs to reside and continue to reside at the Apartment. According to Plaintiffs, Defendant RBT has outstanding violations from 1989 regarding the hazard of lead based paint in the building, and therefore had actual and constructive notice of the lead in the apartment. Plaintiffs further maintain that the defendants were negligent in failing to properly, timely and efficiently correct and/or alleviate the defective conditions.

In his deposition, JAC ZADRIMA, one of the owners of 96 WADSWORTH, stated that he received a Commissioner of Health Order to Abate Nuisance for the apartment, dated October 17, 2002, and was again made aware of the presence of lead when he received another violation for the presence of lead in the apartment in 2006.

Plaintiff moves for an order of the court, pursuant to CPLR §§ 3211(a)(6), 3211(a)(7), 3211 (b) and General Obligations Law §3-111, dismissing Defendant RBT PROPERTY ASSOCIATES' ("RBT") Counterclaim asserted against Plaintiff ERMIDA GALVAN, and striking the affirmative defenses contained in Defendants' respective Answers. Defendant cross-moves to disqualify Barton, Barton & Plotkin from representing both the infant children MELISSANDRA FLORIAN GALVAN and ALEX FLORIAN, and their mother ERMIDA GALVAN, based upon an alleged conflict of interests. Defendant alleges that the mother's and children's interests are in conflict, because the children are suing the defendants in connection with alleged injury, while the mother is suing separately in her own right.

Defendant's Counterclaim against Plaintiff ERMIDA GALVAN states that Plaintiff knew or should have known of the presence of any dangerous or unsafe condition in or about the

premises that they occupied; that the apartment she and her children occupied contained lead based paint; that she failed to maintain the premises in a manner that prevented her children from having access to the lead based paint; that should this Court find liability from the alleged lead based poisoning then it should allocate liability by and among Plaintiff and defendants; that Plaintiff knew or should have known that the infant plaintiffs ALEX FLORIAN and MELISSANDRA FLORIAN-GALVAN had ingested paint chips and failed to seek prompt medical attention for the infants. Defendants also claim that by reason of the foregoing, Plaintiff is partially and/or totally responsible for the alleged injuries sustained by the infant plaintiffs, and that if the Defendant is held liable to the infant plaintiffs, Plaintiff ERMIDA GALVAN must indemnify, hold-harmless, and reimburse the Defendant for any damages which said Defendant may incur by reason of the alleged injuries to the infant plaintiffs.

In addition to the counterclaims against Plaintiff ERMIDA GALVAN, Defendant RBT has a cross-claim against Co-Defendant 96 Wadsworth stating that although RBT denies the Plaintiff's allegations of wrongdoing, in the event that there is a verdict in favor of the Plaintiffs against RBT, said defendant demands judgment over and against Co-Defendant 96 Wadsworth, and full and complete indemnification, by reason of its wrongful conduct being the primary and/or active while any wrongdoing by RBT, if any, was secondary and/or passive.

RBT's second cross-claim against Co-Defendant 96 Wadsworth states that if RBT is found liable to the Plaintiffs, it alleges that it is entitled to contribution for any judgment over and against co-defendant for all or part of any verdict or judgment Plaintiffs may recover against RBT, on the basis of apportionment of responsibility for the alleged occurrence.

In its Affirmation Submitted in Partial Opposition to Plaintiffs' Motion to Strike Defendants' Counterclaims and Affirmative Defenses, Co-Defendant 96 WADSWORTH, LLC

claims that Plaintiff ERMIDA GALVAN failed to return the annual window guard notices and lead paint notices that would have apprized them that infants under the age of seven were living with her, and that this caused, created, or contributed to the damages complained of in the Complaint. In addition, Co-Defendant 96 WADSWORTH claims ERMIDA GALVAN was difficult in providing access to Co-Defendant 96 WADSWORTH in order for Co-Defendant to ascertain whether children lived with her at the premises for abatement purposes, which Co-Defendant claims caused, created or contributed to the damages complained of in the Complaint.

Co-Defendant 96 WADSWORTH's Affirmation also contains a deposition of JAC ZADRIMA, one of the owners of 96 WADSWORTH, in which he states that his staff allegedly made two attempts to gain access to the apartment after the annual forms had not been returned, but were unable to gain access to the apartment. ZADRIMA also states that prior to receiving the Department of Health notification that lead had been found in Plaintiffs' apartment, the apartment had not been inspected for the presence of lead paint. In addition, he alleges that during the time the lead abatements were done in the apartment in 2006, the family was not relocated to a different apartment.

Defendant RBT claims ERMIDA GALVAN was allegedly aware as early as February 25, 1999 that her daughter MELISSANDRA FLORIAN-GALVAN had been tested and showed signs of lead in her system, and ALEX GALVAN as early as October 18, 2001. RBT claims it did not receive any notice from the Plaintiff ERMIDA GALVAN concerning any problems with lead poisoning during the entire period that RBT owned the premises. RBT claims that it sold the building on February 29, 2002. A Summons and Complaint was not filed until June 17, 2003 and according to the Defendant, were not served upon them until June 25, 2003. Defendant

claims no violation was ever placed upon the building concerning a lead paint problem while RBT was the owner.

Defendant demands judgment dismissing the verified complaint of the plaintiffs herein together with costs and disbursements or, in the alternative, if by reason of the matters set forth in the verified complaint, the defendant is held liable for damages to the infant plaintiffs, then said defendant demands judgment over against the Plaintiff, ERMIDA GALVAN, and Co-Defendant 96 Wadsworth LLC on its counter-claim and cross-claim in the same amount or for such part thereof as is consistent with an allocation of the relative culpability of the parties, together with the costs and disbursements of this action.

During Plaintiff ERMIDA GALVAN's deposition, she stated that her apartment was painted when she moved in, but that it was not freshly painted. She also stated that she noticed paint peeling from the walls from the period when she moved in, around 1995, continuing after February 2002 when the building was sold to 96 WADSWORTH, LLC. Plaintiff testified that the Defendant RBT never painted her apartment while she lived there, and that the paint on her walls started peeling around 1998.

Plaintiff ERMIDA GALVAN also stated during her deposition that while the building was under the ownership of RBT, she did not speak to the owner of the building about making any repairs to her apartment. However, Plaintiff alleges that she spoke to the building superintendent while the building was still under the management of RBT; however, he allegedly did not do anything to remedy the situation. Plaintiff stated that after speaking to the super she did not speak to the building landlord until after RBT sold the property and new personnel was hired by 96 WADSWORTH, LLC.

Plaintiff also stated that she did not notify any government agencies after she learned that her daughter MELISSANDRA FLORIAN GALVAN had lead poisoning, even though her doctor advised her to contact a government agency. According to the Plaintiff, the diagnosis of the infant plaintiffs' lead poisoning took place in 2001. Plaintiff repeatedly claims she informed RBT's agent, the superintendent, and his wife, that her children were suffering from lead poisoning.

Plaintiff ERMIDA GALVAN also claims in her deposition that she did not ever try to scrape or remove the loose paint from the wall. She stated that she always watched the children to make sure they did not touch the paint or get any in their mouth.

Plaintiff moves to dismiss the Defendant's counterclaims against her pursuant to CPLR §§ 3211(a)(6), 3211(a)(7), 3211 (b) and General Obligations Law §3-111. Under CPLR §§3211 (a)(6) and (a)(7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a counterclaim is not properly interposed in the action; or the pleading fails to state a cause of action.

On a motion to dismiss, the allegations in the complaint are accepted as true. In deciding a motion to dismiss, all reasonable inferences are drawn in the plaintiff's favor. The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059.

In *Holodook v. Spenser*, the Court of Appeals held that there is no cause of action against a parent for their negligent supervision of their child. 36 N.Y.2d 35, (1974). In *LaTorre v. Spenser*, the Court of Appeals also held that there is no cause of action against a parent for failure to provide adequate supervision to her child. 90 N.Y.2d 576, (1997). See also *Rios v.*

Smith, 95 N.Y.2d 647, 653 (2001). (in which it was held that a parent could not be held liable for lack of supervision of a child, unless it was "clearly foreseeable from a child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control.")

With regard to lead paint cases specifically, the Courts have repeatedly held that landlords cannot assert counterclaims and affirmative defenses based upon allegations that the parents failed to prevent their children from ingesting lead. The counterclaims brought by landlords in these cases were held insufficient to overcome the rule prohibiting claims based on negligent parental supervision. *See e.g., Rosario v. Bann Housing Corp.*, 633 N.Y.S.2d 947 (1st Dept 1995); *Morales v. Felice Properties Corp.*, 633 N.Y.S.2d 305 (1st Dept 1995).

In the instant matter, Defendants claim Plaintiff ERMIDA GALVAN was negligent in failing to seek prompt medical care for her children. However, in *Fontanez v. Libra*, the Court held that alleged failure to promptly obtain medical care for a child who ingested lead falls within the scope of the nonactionable tort of negligent parental supervision. 681 N.Y.S.2d 282 (1st Dept 1998).

Based on the facts of this case and long established principals cited in the aforementioned cases, the Plaintiff's motion to dismiss is granted pursuant to CPLR §3211 (a)(7). It is clear that Defendants' counterclaims do not establish a cognizable cause of action under the *Holodook* rule. 36 N.Y.2d 35, (1974). Consequently, there is no need to address CPLR §3211 (a)(6) or General Obligations Law §3-111.

Therefore, Plaintiff's motion to dismiss Defendant RBT PROPERTY ASSOCIATES' Counterclaim asserted against Plaintiff ERMIDA GALVAN as being partially and/or totally

responsible for the alleged injuries sustained by the infant plaintiffs is hereby granted and same are hereby stricken.

That branch of the motion involving Defendants' claims that because the infant Plaintiffs are suing the Defendants for alleged injury, and their mother ERMIDA is suing the Defendants in her own right, there is a conflict of interest. However, ERMIDA's cause of action is a direct result of the injuries her children allegedly suffered as a result of the alleged Defendants' negligence. Any other cited basis for the Complaint has been dismissed as the defendants' counter claims alleging liability on behalf of the infants' mother has been dismissed. As the Defendant has not presented any relevant law supporting the remaining basis for an alleged conflict of interest under the given circumstances, Defendant's motion to disqualify Barton, Barton & Plotkin from representing both the infant children MELISSANDRA FLORIAN GALVAN and ALEX FLORIAN, and their mother ERMIDA GALVAN is hereby denied.

The remaining branch of Defendant RBT's motion to serve an amended answer and counter-claim is granted, except as to those counterclaims alleging parental negligence, which have been dismissed as pled by the co-Defendants in this Decision. There is no surprise or prejudice alleged by the Plaintiff in response to the serving of the amended papers and accordingly same is granted.

Furthermore, in examining the record, the Court notes that Co-Defendant 96 WADSWORTH's Affirmation in Partial Opposition to Plaintiff's Motion also contains affirmative defenses contrary to the *Holodook* rule, and are therefore dismissed based upon the reasoning cited in this decision as it relates to the claims of Defendant RBT.

Parties are to proceed with the scheduled conference.

Dated: ~~July 24, 2008~~
Oct 16, 2008

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JUDGE MILTON A. FINKEL

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