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

PRESENT: MATTHEW F. COOPER PART 52

Justice

Angel Duran

INDEX NO. 104729/2004

MOTION DATE

- v -

Wadsworth Ave. Baptist church, et. al.

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for SJ

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION ~~AND CROSS MOTION(S)~~ ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED

FEB 24 2009

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 2/19/09

MATTHEW F. COOPER J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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ANGEL DURAN, an Infant by his Mother and Natural Guardian, BARBARA DURAN,

Index No. 104729/04
Mot. Seq. No. 005

Plaintiffs,

DECISION AND ORDER

-against-

WADSWORTH AVENUE BAPTIST CHURCH, INC., FORT GEORGE COMMUNITY ENRICHMENT CENTER, INC., and COLUMBIA-PRESBYTERIAN MEDICAL CENTER,

Defendants.

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WADSWORTH AVENUE BAPTIST CHURCH, INC.,

Third-Party Index No.: 590449/07

Defendant/Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK

Third-Party Defendant.

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For the Plaintiff
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Papers and exhibits considered in review of the motion:

Notice of Motion:	1
Affirmation in Opposition	2
Reply Affirmation	3

Matthew F. Cooper, J.

This is an action in negligence for injuries allegedly sustained by the infant plaintiff as a result of exposure to and ingestion of lead dust and/or chips of lead based paint at defendant Fort

George Community Enrichment Center's ("Fort George") Head Start preschool program, housed in the Wadsworth Avenue Baptist Church ("the Church"). The Church moves for summary judgment dismissing the complaint arguing plaintiff cannot establish a prima facie case of negligence against it in that the Church had no notice, either actual or constructive, of the lead paint condition.

Facts

Plaintiff, Angel Duran, by his mother and natural guardian, Barbara Duran, alleges that as a result of illegal concentrations of lead paint at the Fort George Community Center's Head Start preschool program, he was exposed to hazardous levels of lead and as a result has suffered physical maladies. Plaintiff was born on May 4, 1993 and began attending Fort George's preschool program located at the Church in September of 1996. The presence of peeling paint at Fort George was first noticed by plaintiff's mother on her assigned turn to assist with the preschool program. Upon noticing the peeling paint and paint chips on the floor, plaintiff's mother notified the social worker at the facility and a teacher who agreed to speak with the principal of the preschool about the condition. After demonstrating prolonged symptoms of poor appetite, stomach pain, and hyperactivity, a blood test in September 1997 determined that plaintiff had elevated blood lead levels.

In response to plaintiff's reported elevated lead levels, the Department of Health ("DOH") inspected plaintiff's residence and the Fort George Head Start facility for the presence of lead. The family apartment was free from lead paint, but the Fort George facility was found to contain illegal concentrations of lead and peeling paint. Plaintiff has long since left the Fort George preschool, but has evidenced concentration and attention problems and below normal intellectual functioning.

The Wadsworth Avenue Baptist Church of New York City was constructed in 1926 at

Wadsworth Avenue and 184th Street in New York, New York. The Church has owned, operated, and managed the Church property and building since its construction. In 1986, Fort George and the Church entered into a lease agreement, permitting Fort George to use a portion of the Church for a Head Start preschool program. The lease is at issue inasmuch as it refers to the parties' duties to maintain the leased premise free from hazards and generally to comply with health and safety laws.

Plaintiff filed the summons and complaint commencing this action on March 22, 2004. The Church now moves for summary judgement dismissing plaintiff's complaint. Plaintiff opposes the Church's motion and counters that the Church has not established a prima facie case that it lacked knowledge of the condition.

Analysis

The City of New York enacted Administrative Code ("AC") § 27-2013(h) to require landlords to remove lead paint conditions from their buildings and to hold them liable for injuries resulting from a lead paint condition where the landlord had actual or constructive notice of the defective condition for such a period of time that the condition should have been corrected with the exercise of reasonable care. AC § 27-2013(h)(Repealed)[1]; *Juarez v. Wavecrest Mgt Team*, 88 NY2d 628, 646 (1996); *Chapman v. Silber*, 97 NY2d 9, 20 (2001). When a preschool is the subject premises involved, the school owes that standard of care to the attending children that "a parent of ordinary prudence would observe in comparable circumstance." *Enright by Enright v. Busy Bee Playschool*, 164 Misc2d 415 (Sup Ct, Rockland Cty 1995). This elevated standard has specifically been held to apply to Head Start preschool programs and the abatement of lead-based paint

[1]Although AC § 27-2013(h) has since been repealed, at the time this action was brought in March 2004, the statute was still in effect. The statue was subsequently replaced by §§ 27-2056.1 *et seq* as of August 2, 2004.

conditions from the program's premises. *See Espinal v. 570 W. 156th Assocs.* 174 Misc2d 860 (Sup Ct, NY Cty 1997), *aff'd,* 258 AD2d 309 (1st Dept 1999). *Espinal* states that "in a building constructed prior to 1960 that houses a Head Start program, notice of a peeling paint condition in an area used by children creates a rebuttable presumption that the landlord had notice of the lead paint hazard." *Id* at 865-66. Applying this presumption to the case at hand, the outstanding issue and the issue on which the Church moves for summary judgement, is whether the Church had actual or constructive notice of the peeling paint condition such that the rebuttable presumption of notice of the lead paint hazard is applicable.

When assessing the merits of a summary judgment motion, the court is engaged in "issue-finding, not issue-determination" and may not grant the motion when material and triable issues of fact exist. *Color by Pergament v. Pergament*, 241 AD2d 418, 420 (1st Dept 1997). Where the court maintains "any doubt as to the existence of triable issues of fact," the motion for summary judgment should be denied. *Vos v. City of New York*, 234 AD2d 70 (1st Dept 1996). The initial burden on a motion for summary judgment is on the moving party to produce evidentiary proof in admissible form that sets forth the material facts and demonstrates that the opposing party's cause of action lacks merit. *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965, 967 (1985). Once the moving party has met this burden, in order to defeat the motion, the party opposing the motion must demonstrate by admissible evidence the existence of "facts sufficient to raise a triable factual issue." *Id.; Parks v. Greenberg*, 161 AD2d 467, 468-69 (1st Dept 1990). However, where a moving party fails to meet its initial burden, the opposing party need not come forward with proof sufficient to withstand the motion. *Rodriguez v. Goldstein*, 182 AD2d 396, 397 (1st Dept 1992).

Supporting its argument that it lacked actual or constructive notice of the peeling paint

condition, the Church submits the transcripts of the deposition testimony of the current Pastor of the Church, the current Executive Director of the Fort George preschool program, and an employee of the DOH's Bureau of Child Care. The deposition of Pastor Josh Blair, who has been at the Church since 2005, indicates that during his tenure he was unaware of a peeling paint condition and has no knowledge of what the conditions were in 1996, when plaintiff began attending preschool at Fort George, or in 1986, when the premises were leased to Fort George. Pastor Blair also testified that he never spoken with DOH, he has no record of any DOH violations for the Church, and that the Church custodian does not maintain or work in the areas of the Church which house the preschool program. Both the deposition of Carolyn Wiggins, Executive Director of Fort George since 2006, and James McCormack, employee of DOH's Bureau of Child Care, are inconclusive as to whether the Church had notice of peeling paint conditions in 1996 and 1997, as well as the years prior to this period. The Church also submitted records of DOH's Bureau of Child Care indicating that notifications for peeling paint violations were addressed to the Fort George Day Care Center.

While the evidence presented by the Church may show that the current Pastor did not have notice of the condition, none of the evidence submitted by the Church conclusively establishes that the Church as a whole lacked notice of the condition from the time Fort George began using the Church facilities through the date plaintiff was allegedly exposed to lead paint. Thus the Church failed to meet its initial burden of presenting evidentiary proof in admissible form establishing that it is entitled to judgment as a matter of law and that no triable issue of fact exists concerning notice of the condition. *See Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980)("to obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender

of evidentiary proof in admissible form"). It is not for this court to determine the issue of notice as a matter of law where the moving party, in this case the Church, fails to meets its initial burden and there remains doubt as to a material issue of fact. *See Color by Pergament v. Pergament*, 241 AD2d at 420. Because the Church has not made out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers. *See Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986); *see also Di Menna & Sons v. City of New York*, 301 NY 118, 121 (1950)(holding that in order to grant summary judgment, "it must clearly appear that no material and triable issue of fact is presented"). Under these circumstances, the court need not address the merits of plaintiff's opposition papers. Nor need it reach plaintiff's argument that the the Church's papers were flawed. In any event, if the court were to do so, it would find that plaintiff's affidavit of William Savarese, a Lead Inspector and Risk Assessor, the exhibits, and the references to the lease between the Church and Fort George create a triable issue of fact as to notice of the lead paint condition to the Church.

In light of the foregoing, it is

ORDERED that defendant Wadsworth Avenue Baptist Church's motion for summary judgment is denied; and it is further

ORDERED that the Trial Support Office shall re-assign this action to a non-City part inasmuch as the City is no longer a defendant in this case, having previously been dismissed from the action.

This constitutes the Decision and Order of the Court.

Dated: February 19, 2009

Matthew F. Cooper, J.S.C.