NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Bernice D. Siegal Part 5
Justice

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SHEA RHYS, an Infant by her Mother and Natural Guardian, COLLEEN LINO and COLLEEN LINO, Individually, by her mother and natural guardian, COLLEEN LINO,

Plaintiffs,

-against-

FERNANDO ROSSI,

Defendant.
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Index No. 30509/07
Motion Date: 6/10/09
Calendar No. 18
Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion for summary judgment and to dismiss and cross motion to amend the complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion.....	5-7
Affirmation in Reply to Cross-Motion.....	8-10
Reply.....	11-13

Upon the foregoing papers, it is ordered that the motion for failure to state a cause of action and granting summary judgment to defendant and plaintiff's cross motion are denied as more fully set forth below:

Although Plaintiff's motion for an order deeming the amended complaint as timely served nunc pro tunc or in the alternative granting plaintiff's leave to amend paragraph 36 of the complaint was made by cross-motion, it will be addressed first, since, as a procedural matter, it impacts on what pleadings are to be the basis of the main motion. The moving defendant, Fernando Rossi, in his Reply Affirmation asks the court to deem plaintiff's Amended

Verified Complaint a pleading together with its answer served on May 1, 2009 as part of defendant's motion to dismiss. Accordingly, as defendant has accepted the amended complaint, the relief requested by plaintiff is denied as moot but both amended pleadings are deemed part of the motion to dismiss pursuant to CPLR §3211(a)(7) and summary judgment motion pursuant to CPLR §3212.

Background

Plaintiff commenced this negligence action to recover for injuries sustained by infant plaintiff Shea Rhys from exposure to lead paint. Plaintiffs resided at the second floor apartment of the property owned by defendant at 129-28 131st Street beginning sometime in the middle of 1995 through July 2005. Plaintiff contends that during this time infant plaintiff Shea Rhys was exposed to lead-based paint and thereby suffered injury as a result of defendant's negligence in maintaining lead-paint conditions in the apartment. The results of two venous blood tests show that the infant plaintiff had blood lead levels of 3 micrograms per deciliter (ug/dl) on May 8, 1995 and 6 ug/dl on August 6, 1997.

The New York Public Health Law defines the term "elevated lead levels" as "a blood lead level greater than or equal to ten micrograms of lead per deciliter of whole blood or such blood level as may be established by the department pursuant to rule or regulation." (*McKinney's Public Health Law* § 1370(6) [2001].) The New York City Health Code states that lead poisoning is "to be defined as a blood-lead level of 10 micrograms per deciliter or higher." (*New York City Health Code, 24 RCNY Hlth. Code* § 11.03

[2008].) Under these guidelines, children with blood lead levels below 10 ug/dl are not considered to be lead poisoned.

Defendant Rossi moves for dismissal for failure to state a cause of action and summary judgment, arguing that the infant plaintiff has suffered no legally compensable injury. Defendant relies on the state and local guidelines that define lead poisoning as having a blood lead level of 10 ug/dl or higher, that under these guidelines the presence of lead in blood alone does not constitute a claim for injury and that any claim of injury does not constitute a cause of action against the defendant since any injury related to lead would be that of lead poisoning. Rossi contends that since the infant plaintiff's highest blood lead level was that of 6 ug/dl, the threshold set out in the State and City guidelines was not met. As such, the defendant maintains the infant plaintiff has not been lead poisoned and has suffered no injury.

Plaintiffs oppose the motion, arguing that, although the infant's blood lead level did not meet the 10 ug/dl threshold set out in the guidelines to be considered lead poisoning, there is a disputed and material issue of fact as to whether the infant plaintiff suffered a compensable injury. (*Cunningham v. Spitz*, (218 A.D.2d 639 [2d Dept. 1995]). In *Cunningham*, the Appellate Division denied defendant's motion for summary judgment, holding that "the plaintiffs raise triable issues of fact as to whether the plaintiff Elton Cunningham was injured as a result of his exposure to lead, notwithstanding the fact that his blood-lead level did not fall within scientifically accepted definitions of lead poisoning." *Id.*

However, Defendant Rossi argues that the case of *Arce v. New York City Hous. Auth.*,(265 A.D.2d 281 [2d Dept. 1999]), overrules the *Cunningham* holding and supports the position that blood lead levels under 10 ug/dl are not actionable. The court in *Arce* set aside a verdict for the plaintiff in an action to recover damages for lead exposure. In doing so, the court referred to a blood lead level of 3 ug/dl as "normal." (*Id.* at 282). The Arce court also held that a test showing the plaintiff's blood lead level as 11 ug/dl was erroneous. *Id.*

The court rejects Defendant's broad reading of the Arce holding and joins the court in *Peri v. City of New York,* (8 Misc. 3d 369 [Sup Ct, Bronx Co. 2005]), in finding that the Appellate Division did not overrule Cunningham and "did not hold . . . that blood lead levels of under 10 ug/dl cannot support a verdict. Rather, the court's decision turned on an evaluation of the trial evidence as a whole, including facts indicating that the one and only test indicating an elevated blood lead level was erroneous[.]" *Id.* at 339. In denying the defendant's motion for summary judgment, the *Peri* court held that "whether there is an accepted medical theory on which blood lead levels of less than 10 ug/dL may be attributed to injury is a matter best addressed at the appropriate juncture in this case, and not on the present motion." *Id.*

Legal Conclusion

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 N.Y.2d 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. *(See Zuckerman v. City of New York*, 49 N.Y.2d 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 N.Y.2d 395 [1957].) However, the alleged factual issues must be genuine and not feigned. *(Gervasio v. DiNapoli*, 134 A.D.2d 235 [2d Dept. 1987.])

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. (*Leon v. Martinez*, 84 NY2d 83 [1994].) In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact. (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2nd Dept. 2003].) The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts. (*See CPLR § 3211[a][7]*; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1st Dept. 1998].)

Contrary to defendant's contention, there is a material issue of fact as to whether or not the infant plaintiff has suffered injury. This case is directly analogous to that of *Cunningham* and this court adopts the holding in Cunningham. The infant plaintiff is not barred from bringing an action for damages because her blood

lead level is less than 10 ug/dl. Based upon a reasonable view of the stated facts and a liberal review of the pleading, plaintiff's Complaint states a valid cause of action. (*See Rosenheck v. Rosenheck*, 69 AD2d 878 [2nd Dept. 1979].)

Accordingly, defendant Fernando Rossi's motion for summary judgment and to dismiss plaintiff's cause of action is denied.

Dated: September 10 , 2009

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Bernice D. Siegal, J. S. C.