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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

JULIAN CAMACHO, an infant by his mother and natural guardian, JANINA RIVERA, and JANINA RIVERA, individually,,

Plaintiffs,

- v -

NEW YORK CITY HOUSING AUTHORITY,,

Defendant.

Index No.: 110475/06
Motion Date: 06/09/09
Motion Seq. No.: 02
Motion Cal. No.: 13

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 3
Answering Affidavits - Exhibits	4
Replying Affidavits - Exhibits	5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

In this lead paint action, defendant moves for summary judgment to dismiss the complaint, while plaintiffs cross-move for partial summary judgment.

Plaintiffs Julian Camacho (Camacho), an infant, and his mother, Janina Rivera (Rivera), have been residents of public housing that is owned and operated by the defendant New York City Housing Authority (NYCHA) since Julian's birth. Specifically, plaintiffs resided at 75 Baruch Drive, Apt 11C, in New York County from August 2000 through November 2003, and have resided

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

at 60 Columbia Street, Apt 3D, in New York County from November 2003 until the present. In addition, Camacho attended a daycare facility that was owned and operated by NYCHA at 300 Delancey Street in New York County between September 2004 and June 2005.

The plaintiff's pediatric medical records indicate that he had an excessively high blood lead level of 24 ug/dL when he was examined on June 13, 2005. On the other dates that he was tested over the course of his life, his blood lead levels have apparently been within normal parameters. After receiving the June 13, 2005 test results, however, plaintiffs requested that the New York City Department of Health and Mental Hygiene (DOH) inspect 75 Baruch Drive, 60 Columbia Street and 300 Delancey Street for lead paint. The DOH inspections were positive at all three locations, and the agency issued orders to abate the lead paint nuisance at each of them. NYCHA, thereafter, conducted its own inspections, and performed lead paint abatements at 75 Baruch Drive and 60 Columbia Street, but not at 300 Delancey Street, where it performed only a "paint stabilization," for which NYCHA issued a notification that the results were acceptable.

With respect to the first cause of action concerning the alleged exposure at 60 Columbia Street, defendant argues that "there is simply no proof that a hazardous lead-based paint condition actually existed" there and cites plaintiff's deposition testimony that she had never observed any peeling

paint in the apartment. As regards the elements of duty of care and notice in lead paint cases, the Court of Appeals held in Juarez by Juarez v Wavecrest Management Team Ltd. (88 NY2d 628, 638 [1996]), pursuant to Local Law 1, "that to establish liability plaintiffs must demonstrate that the building owner had actual or constructive notice that a child six years of age or under was living in one of its residential units. Under the statutory scheme, a landlord who has such notice is chargeable with notice of any hazardous lead condition in that unit." Plaintiff argues that NYCHA does not dispute having notice that the infant - then aged 4 - resided with his mother at 60 Columbia Street, in June of 2005. NYCHA's argument that there was "simply no proof" that a lead paint condition existed there is legally unsupportable under Juarez. NYCHA's assertion that plaintiff had never observed any peeling paint in the apartment is immaterial, as is its alternative argument, that it "exercised due care and acted in a reasonable manner" in removing the lead paint after the fact because as the Court has stated in interpreting Juarez,

> Any implication in the decision that that building was erected prior to 1960 does not change the thrust of the above quoted statements. The effect of such statements is clear--absent an issue of fact as to whether an alleged lead paint condition caused the injuries complained of, and absent evidence that reasonable efforts to abate the condition were made before the injuries were sustained (necessarily the case when the landlord does not have actual notice of the condition and does not exercise its right of entry to inspect), the 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 and whether the landlord had actual notice of peeling paint or other indications of a hazard are immaterial.

Woolfalk v New York City Housing Authority, 263 AD2d 355, 356 (1st Dept 1999) (emphasis added). Therefore, the court concludes that plaintiff has presented a prima facie case with respect to the duty of care and notice elements of the negligence claim as to the lead exposure at 60 Columbia Street.

The court reaches the same conclusion with respect to the proximate cause element of the cause of action. Plaintiff has submitted on this motion/cross-motion copies of his medical records, and the expert opinion of his doctor, John F. Rosen, M.D. that the exposure at all three locations caused injury to the plaintiff irrespective of the precise level of tested lead on any particular test. This evidence directly refutes defendant's unsupported argument that only exposures after June 2005 should be the subject of liability. Contrast Arce v New York City Housing Authority, 265 AD2d 281, 282 (2d Dept 1999) (blood test administered after the first test indicated a normal blood lead level and all of the experts agreed that a dramatic drop was unlikely, if not impossible, over such a short period of time). The court here notes that NYCHA has not presented any medical evidence in support of its assertions. Therefore, the court finds that plaintiff has set forth a prima facie case with respect to the first cause of action (i.e., negligence by NYCHA

with respect to lead paint at 60 Columbia Street), and that NYCHA has failed to raise any triable issues of fact in opposition. Accordingly, the court shall grant plaintiffs' cross-motion for summary judgment with respect to the first cause of action on the issue of liability, and deny defendant NYCHA's motion seeking dismissal.

With respect to the second cause of action concerning 75 Baruch Drive, NYCHA again argues that because plaintiff only lived there until 2003, and was not diagnosed as having an excessively high blood lead level until 2005, the claim that bears on this premises should be dismissed. The court rejects this argument on the facts and the law. As stated previously, the medical evidence submitted by plaintiff factually refutes defendant's unsupported assertion. As this court observed in Colon by Colon v New York City Housing Authority (165 Misc 2d 348, 351 [Sup Ct, NY County 1995, Goodman, J.] affd 233 AD2d 123 [1st Dept 1996]), "the Administrative Code of the City of New York . . . clearly prohibits the continued presence of lead paint in any multiple dwelling where children under six are likely to reside, regardless of the level of lead found in an individual child's blood (emphasis added)."

NYCHA further argues that it had no notice that Camacho was living at 75 Baruch Drive, and, therefore, cannot be charged with constructive notice of a potential lead paint violation which it

would have a duty to correct. NYCHA presents copies of the residency records for 75 Baruch Drive for 2000 through 2003, none of which indicate that plaintiff lived in the apartment. Plaintiff counters that defendants' argument must fail because those residency records show that at least one child under the age of six was residing at 75 Baruch Drive, and that, therefore, NYCHA should still be charged with constructive notice that there was an infant living in the premises. The court agrees with defendant that plaintiff has failed to and will be unable to establish actual or constructive notice. A review of the occupancy records reveals that the only minor listed on the residency records is plaintiff-mother's younger sister whose birthday is listed as November 1990, and who was, therefore, over the age of six during the time period at issue herein. Therefore, there is no evidence that NYCHA had constructive notice of the presence of an infant residing at 75 Baruch Drive which would trigger its duty to remove all lead paint at those premises at the time plaintiff lived in the premises. See Vega v New York City Housing Authority, 52 AD3d 294 (1st Dept 2008) ("defendant met its prima facie burden of establishing lack of notice that a child under seven years of age resided in the subject apartment").

Based upon Vega, the defendant has met its prima facie burden as to the lack of notice at 75 Baruch Drive and therefore

plaintiffs' second cause of action shall be summarily dismissed ono defendant's motion.

With respect to the third cause of action concerning 300 Delancey Street, NYCHA seeks dismissal arguing that it had performed a full lead paint abatement at the day care center in 1999, and that the DOH did not require it to repeat the procedure in 2005 after plaintiff had been diagnosed with high blood lead levels. As support, NYCHA presents a copy of the report of an independent laboratory that determined that none of the paint chips taken from 300 Delancey Street for testing in 2005 were found to contain lead. Plaintiffs' counter that NYCHA's duty of care is governed by 24 RCNY §47.44 (currently recodified at 24 RCNY §47.63), which sets forth a different duty of care than does Local Law 1. The court agrees with plaintiff's argument. 24 NYCRR §47.44 clearly imposes a duty of care on the owners and operators of day care centers that is triggered whenever any peeling paint is found in a day care center, whether that paint contains lead or not. Here, DOH's order to abate the nuisance and the report of NYCHA's inspector both indicate that there was peeling paint at 300 Delancey Street. Thus, NYCHA's duty was triggered, and it has failed to raise a triable issue of fact with regard to the breach of that duty of care toward plaintiff. The court finds that NYCHA's argument also fails as regards the causation element of plaintiff's claim. Both DOH's order to

abate the nuisance and NYCHA's inspection report indicate that "another surface" in the day care center - a sink - was found to contain unacceptably high levels of lead which could have caused, or contributed to plaintiff's injuries. Thus, NYCHA has failed to raise a triable issue with respect to the causation element of plaintiff's claim. NYCHA raises no further arguments against this cause of action, while, as previously noted, Camacho has met his burden of proof with respect to the remaining elements of his negligence claim. Accordingly, the court finds that Camacho's cross motion should be granted with respect to his third cause of action on the issue of liability, with the issue of damages to be determined at trial, and that the portion of NYCHA's motion that seeks dismissal of said cause of action should be denied.

The balance of NYCHA's motion seeks dismissal of plaintiffs' fourth cause of action, which is a derivative claim for loss of services asserted on behalf of Janina Rivera. NYCHA argues that this claim must fail if all of Camacho's claims fail. However, because the court has determined that Camacho is entitled to summary judgment on two of his claims, there is no basis for dismissing the derivative claim at this juncture. Accordingly, the court finds that the portion of NYCHA's motion that seeks dismissal of said cause of action should be denied. The court cannot grant Rivera summary judgment on her claim at this juncture, however, since plaintiffs' cross motion did not request

such relief or present any argument or evidence in support thereof and the record is insufficient to grant such relief.

Accordingly, it is

ORDERED that the motion for summary judgment pursuant to CPLR 3212 of the defendant New York City Housing Authority is GRANTED as to plaintiffs' second cause of action and that cause of action is hereby DISMISSED and the motion is otherwise DENIED; and it is further

ORDERED that the cross-motion of the plaintiffs for summary judgment is GRANTED pursuant to CPLR 3212 as to the first and third causes of action on the issue of liability, with the issue of damages to be determined at trial and cross-motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference in Part Mediation-2 in December 2009 and if the case is not settled thereat, the parties are to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on January 26, 2010 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: NOV 24 2009

ENTER:

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

DEBRA A. JAMES J.S.C.
J.S.C.