Powell v Graham Ct. Owners Corp.

2009 NY Slip Op 33033(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 102674/2006

Judge: Joan B. Carey

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SCANNED ON 11/13/2009
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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SYDNEY ARIEL POWELL, Infant
by her Mother and Natural Guardian,
LESLIE POWELL, and LESLIE POWELL,
Individually,

Index No. 102674/2006

Motion Sequence No.: 2

Plaintiffs,

-against-

GRAHAM COURT OWNERS CORP., RESIDENTIAL MANAGEMENT, INC., SAM BECK, JOSHUA FRANKEL, LABE TWERSKI, DENNIS J. ALLENDORF, M.D., RICHARD L. MONES, and JP PLENO MOISE, M.D.,

Defendants.

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FILED
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NEW YORK
COUNTY CLERK'S OFFICE

The following papers, 1-51, were read on this motion by defendants Graham Court Owners Corp., Residential Management, Inc., Sam Beck, Joshua Frankel, and Labe Twerski for summary judgment dismissing the complaint, as asserted against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-18
Affirmation in Opposition - Affidavits - Exhibits	19-49
Replying Affirmation -	50-51

Joan Carey, J.:

In this action, in which it is claimed that the infant plaintiff, Sydney Ariel Powell (Sydney), suffered injuries as a result of her ingestion of, and exposure to, lead paint, the landlord and managing agent defendants move for summary judgment on limited grounds. Specifically, Sam Beck, also known as Samuel Becker (Beck), Joshua Frankel (Frankel), and Labe Twerski (Twerski), all associated with the defendant managing agent, Residential Management, Inc. (Residential), move for summary judgement on the grounds that they cannot be held individually liable because plaintiffs will be unable to show that they so dominated the corporate form as to defraud or commit malfeasance against plaintiffs, and, thus, will be unable to pierce the corporate veil; and because the subject premises were never declared a public nuisance pursuant to Multiple Dwelling Law § 4 (44).

Summary judgment is also sought in favor of Residential, the building's owner, Graham Court Owners Corp. (Graham Court), as well as the individual movants on the grounds that Sydney's mother, plaintiff Leslie Powell (Powell), alone created the hazardous lead condition which resulted in Sydney's exposure, and impeded the abatement process. The movants' memorandum of law adds that movants acted reasonably under the circumstances because, after being served with a notice of violations and order to abate, they acted promptly to abate the lead paint hazard, and therefore cannot be found to have been negligent under the Administrative Code of the City of New York § 27-2013 (h).

Background

In or about January of 2000, Powell signed a one-year lease and moved into apartment 2-E (the apartment), a seven-room unit, in a landmark building located at 1925 7th Avenue (the building). Powell was approximately four months pregnant with Sydney at the time. The building contained about 100 units, and was a multiple dwelling that was built in 1920, *i.e.*, before the City banned, in 1960, the sale of lead paint for interior use (*See Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 641 (1996)), and had been owned by Graham Court since the late 1980's. The building is managed by Residential, which has about 20 employees; Residential managed approximately 50 buildings. Frankel ebt, at 10-11.

Before Powell signed the lease, Beck, a managing agent for Residential, showed her the apartment. According to Beck's testimony, he essentially worked in the field supervising the maintenance of about 20 buildings for Residential, and that the buildings' superintendents reported to him. He further testified that he would "try" to go into apartments once a year to see if there were leaks or peeling paint. Beck ebt, at 37. Beck's immediate supervisor was Frankel. *Id.* at 148. The subject apartment, at the time it was shown to Powell, required many structural repairs, such as the replacement of missing windows, the installation of floor boards in two rooms, and the replacement of all major kitchen fixtures and cabinets, which were absent. Also, there was peeling paint in the hallway. The repairs were scheduled to have been completed before Powell moved in on January 20, 2000. However, many of these repairs were not performed as scheduled. Nonetheless, Powell moved in, and some repairs were performed over the course of the next several months, while Powell was living in the apartment. It is noted that at least one floor was not installed for over a year after Powell moved into the apartment. Such repair work, performed in the apartment, allegedly created a lot of dust.

In addition to the repairs being performed by Residential, it appears that Powell was also performing some repair work in the apartment. Within months after she moved in, and allegedly before Sydney was born, Powell had a friend strip a door frame and window frame in the living room. According to Powell when this work was performed protective sheeting was used. Powell ebt, at 350-353; Powell aff., ¶ 56. This process allegedly created no paint dust or chips. Powell ebt, at 352. In her affidavit, Powell additionally sets forth that in 2000, before Sydney's birth, using a liquid stripper, she removed the paint from the exterior hallway side of her apartment's entry door and frame. It is important to note that at her deposition (at 346-349) Powell testified that such work to the door and frame was performed in early 2001, after Sydney was born. In any event, this process, according to

Powell, did not create any dust or chips in the apartment.

During a tenants' meeting that Powell attended while she was still pregnant with Sydney, she was informed by some tenants that there was a lead paint issue in the building. Powell ebt, at 147. It appears that prior to Powell's tenancy, numerous violations and orders to abate lead paint nuisances in various apartments in the building had been issued and directed to Graham Court, Residential, Twerski, Frankel and Beck. Aff. In Opp., ex. 12. Powell claims that shortly after learning of the building's lead paint issues, she asked Beck if there was a lead paint problem in her apartment. Beck allegedly responded that, since Powell's apartment had been renovated, there was no problem. Powell aff., ¶ 18.

Sydney was born on May 12, 2000, and was immediately moved into the apartment. Shortly after Sydney's birth, Powell, in light of what she had heard at the tenants' meeting, asked Sydney's physician to test her blood for lead. Sydney's physician advised that they wait until age one to perform such testing. Powell ebt, at 148. In or about April 2001, approximately two-months before Sydney's first elevated blood lead level test results in June of 2001, the apartment's windows and frames were changed, allegedly causing a lot of dust and debris that spread throughout the apartment. It is noted that during this project, the Department of Buildings issued a stop order against the contractor for unsafe practices. Throughout the period of time that the apartment's repairs and renovations were being performed, the building's superintendent, Jose Cruz, and Beck visited the apartment to check on the work. Therefore, as a result of these visits, which took place before Sydney's first elevated blood lead level test results, both Cruz and Beck were allegedly aware that a child under the age of seven was residing in the apartment.

At her one-year exam in June 2001, Sydney's blood level was tested and found to be 18.9 ug/dL, an elevated level. Sydney was treated with calcium and iron supplements. Powell was instructed by Sydney's physician to contact the building's owner and management company. In August 2001, Powell contacted Frankel, and advised Frankel of Sydney's elevated blood lead level. Frankel was also a managing agent for Residential, who worked principally in Residential's office, which was located at the same address as Graham Court's office. Frankel, in conjunction with Beck, was responsible for the management of the building. However, as previously noted, Frankel supervised other managing agents, including Beck. Frankel oversaw the buildings on behalf of Residential, and would oversee their maintenance and income. *Id.* at 11, 78. Frankel would only go to the buildings on "special occasions," as opposed to Beck, who would be visiting on a regular basis. *Id.* at 69. Frankel's supervisor at Residential was Twerski, to whom he would go if he needed direction on anything. Frankel ebt, at 24-25.

Twerski was Residential's president and/or CEO. Twerski (ebt, at 11, 29) as well as an officer of Graham Court. In addition to Twerski, Residential had several other officers. *Id.* at 29-30. Besides Frankel and Beck, Residential had six more managing agents. *Id.* at 32. Both Beck and Frankel had the responsibility of ensuring that the building was properly run. *Ibid.* Twerski would periodically meet with Residential's managing agents, on an as-needed basis if they required some direction, but he would not necessarily be notified if a building had a violation. *Id.* at 48-50. Beck and Frankel were responsible for the building's day-to-day operation, and Twerski would set the general policies, and make decisions

regarding such matters as major capital improvements, financing, vendors, and tenants' credit criteria. *Id.* at 54-55. He might periodically go to a tenants' meeting or to the building to check its general cleanliness, and might bump into tenants and converse with them, all in an effort to get feedback and check on how his agents were doing. *Id.* at 55. However, he was not involved in the day-to-day operation of the buildings. *Id.* at 56. It is noted by the Court that Twerski testified that a lead and asbestos abatement contractor worked "in [his] office." *Id.* at 57.

Powell testified that there were paint chipping issues in the apartment in 2000, 2001 and 2002 and that she made requests to address this in 2001 and 2002 to Cruz, Beck and Frankel.[1] Ebt at, 250. According to Powell, the requests were not addressed for "quite some time" (*id.* at 252), and some work was not done until after a November 15, 2002 order to abate was issued (Powell aff., ¶ 21). Powell further testified that the building's workers renovated the apartment's main bathroom in about late 2001 into 2002, during which they tracked debris out of that room, and did not always clean up the debris they tracked into the apartment's other rooms. Powell ebt, at 326-331.

Powell asserted that, because the work performed by the building's workers created a lot of dust and debris, she had Sydney's blood tested for lead again in November 2002. *Id.* at 503. As a result of that testing, on November 6, 2002, Sydney was diagnosed with a blood level of 22 ug/dL. Consequently, the City's Department of Health was contacted, conducted testing, and found that of the 99 surfaces tested in the apartment, 57 contained unlawful lead in excess of the regulatory limits. Aff. in Opp., ex. 2. Also, deteriorated paint/chips were found. *Ibid.* Appended as exhibit "B" to Powell's affidavit in opposition to this motion are photos taken of the apartment in September and October 2002, showing large areas of heavily chipped and peeling walls and pipes. *See also* Powell ebt, at 248-249. Some of the paint debris depicted in the photos was allegedly created and left by the landlord's workers, who were repairing a leak. Powell aff., ¶ 25; *see also* Powell ebt, at 307-316.

On November 15, 2002, the Department of Health issued an order to abate the nuisance comprised of the 57 violations. Aff. in Opp., ex. 2. In the violation report appended to that order, the paint throughout the apartment was characterized as "[f]air," which according to James Morriss of the Department of Health, who was involved in the case, meant that there was "a moderate level of damage." Morriss ebt, at 64. It is important to note that Morriss testified at his deposition that Powell herself had partially sanded approximately 30% of four pocket doors some time before the violations and order to abate were issued. *Id.*, at 52-54. Morriss did not know exactly when Powell did this work, and testified that Powell had not given him a date, but he later testified that it was not months and months before he came there. *Ibid.* Morriss was not "sure how extensive dust generation may have gone" as a result of this activity (*id.*, at 35), and stated that Powell "potentially" exposed herself, adults, and children to lead. *Id.* at 38. In addition to Morriss' testimony relating to the sanding of these doors, Beck testified (ebt, at 43-48) that at some unspecified time, but not years before, he observed Powell stripping paint from wainscoting

[1] Powell never had any interaction with Twerski. Powell ebt, at 245.

in her entrance foyer, and that the baby was nearby.

Asbestway was ultimately hired to deal with the violations, but there were some disputes between Powell and defendants about the means which would be used to abate the apartment's lead paint. Powell was concerned with the apartment's architectural integrity, in particular that decorative moldings, wainscoting, and wooden doors would be removed and not replaced. The disputes were, after some delay, resolved sufficiently to allow the abatement work to proceed. According to Powell, she privately retained one of Asbestway's workers to remove paint from moldings (Powell ebt, at 272-274, 370-372), after usual working hours, during the period when Asbestway's abatement work was ongoing. That worker was not performing such work on behalf of Asbestway. During the abatement process Powell and Sydney resided in a safe house, rather than in the apartment. The abatement work to correct the violations was ultimately completed by Asbestway. The Department of Health, in March 2003, inspected the apartment, and found that all violations had been corrected. The plaintiffs returned to the apartment in June 2003. Sydney's blood lead levels started to decrease while she resided in the safe house, and essentially continued to drop thereafter. Her most recent level of February 20, 2007 was 4 ug/dL.

Powell, on behalf of herself and her daughter, commenced this action in 2006, alleging in the complaint[2] that the defendants had knowledge that a child under the age of seven resided in the apartment; were aware of the danger that lead paint posed to such children, and that older buildings often contained lead paint; retained the right to reenter the apartment to inspect; and had actual and constructive knowledge that the apartment had damaged paint and/or paint that was not adhering to its underlying surfaces. The complaint further alleged that each individual movant maintained, controlled, managed and repaired the apartment; that all of the defendants had the duty to keep the premises in reasonably safe and habitable condition; that the defendants failed to warn the plaintiffs of a known lead hazard, comply with statutes and regulations, and abate that hazard; and that, as a result of the defendants' negligent acts and omissions, which were committed within the course and scope of each individual defendant's employment or agency, Sydney was exposed to and ingested lead paint chips and dust, and was thereby injured. In response, the moving defendants served an answer which contained, among other things, a counterclaim against Powell, alleging that Sydney's injuries were due in whole or in part to her own negligence.

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[2] Evidently, a bill of particulars was served, as reflected by a comment made by movants' counsel at Morriss's deposition (at 74). However, no copy of that pleading has been appended to the moving papers. *See* CPLR 3212 (b) (which requires summary judgment motions to be supported by a copy of the pleadings); *see also Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007) (which requires the movant on a summary judgment motion to refute the allegations contained in the complaint and the bills of particulars).

The Instant Motion

Twerski, Beck, and Frankel seek summary judgment on the ground that they were simply agents of one or both of the corporate defendants, Graham Court and Residential, and that plaintiffs will be unable to show that they "so dominated the corporate form to defraud or otherwise commit malfeasance against plaintiffs to meet the heavy burden needed to pierce the corporate veil." Thabet aff., ¶ 3. Counsel further observes that, since the building had not been declared a public nuisance, individual liability cannot be imposed on that basis under the Multiple Dwelling Law. *Peguero v 601 Realty Corp.*, 58 AD3d 556, 567, n 2 (1st Dept 2009).

In response, plaintiffs' counsel, who does not claim that the corporate defendants' veils should be pierced, or urge that the building had been declared a public nuisance, recognizes that an individual employee of a management corporation usually cannot be held liable for his actions as a corporate employee, but maintains that this rule does not apply when an employee acts outside the scope of his employment, in which case, plaintiffs' counsel asserts, the employee can be held liable for misfeasance. Gutierrez-Glennon aff., ¶ 96. Plaintiffs' counsel also asserts that, because these individuals failed to act promptly to abate the lead paint hazard, even though they knew that a young child lived in the apartment, they can be held individually liable. Plaintiffs' counsel further asserts that Frankel can be held individually liable because Powell told him that Sydney had an elevated blood lead level, and that there was peeling paint in the apartment, yet he failed to act. *Id.*, ¶ 138. Plaintiffs' counsel claims that Beck can be held individually liable because, when Powell inquired, before her daughter's birth, whether there was a lead paint problem in the subject apartment, he inaccurately and recklessly told her that she had nothing to worry about. Plaintiffs' counsel states that Beck's misstatement was not made within the scope of his employment, and that Beck's misstatement was detrimentally relied upon by Powell. Finally, plaintiffs' counsel urges that Twerski can be held individually liable as president and CEO of Residential, because he failed to properly supervise his employees to make sure that they properly dealt with the lead paint in the building. Specifically, plaintiffs' counsel points to Twerski's deposition testimony allegedly to the effect that he took no direct or active role in the building's management.

"[A] corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *American Express Travel Related Services Co., Inc. v North Atlantic Resources, Inc.*, 261 AD2d 310, 311 (1st Dept 1999); *Peguero v 601 Realty Corp.*, 58 AD3d at 558; *Espinosa v Rand*, 24 AD3d 102 (1st Dept 2005). Under the "commission of a tort" doctrine, individual liability can be imposed on a corporate officer only for "misfeasance or malfeasance, *i.e.*, an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act." *Peguero*, 58 AD3d at 559. The same rule applies to agents of corporate defendants who are not in complete and exclusive control of the premises. *Hakim v 65 Eighth Avenue, LLC,* 42 AD3d 374, 375 (1st Dept 2007); *Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14 (1st Dept 1960). It is evident from the motion papers, including the deposition transcripts, that none of the individual movants was in complete and exclusive control of the premises, and as previously noted, plaintiffs fail to dispute that the premises had not

been declared a public nuisance, and do not urge that the veils of the corporate defendants should be pierced. Thus the only issue is whether the individual defendants have established that they committed no acts of misfeasance or malfeasance, and thus cannot be held liable to plaintiffs.

On a motion for summary judgment, the movant is required to demonstrate his entitlement to judgment by providing enough evidence to eliminate all material factual issues from the case. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The failure to do so requires that the motion be denied, irrespective of the adequacy of the opposing papers. *Ibid.*

Following a review of the papers submitted on the instant application, and based on the Appellate Division, First Department's recent decision in *Peguero v 601 Realty Corp.* (58 AD3d at 556), the Court finds that the individual movants have failed to establish their entitlement to summary judgment, and therefore deny their application. *Peguero*, as is relevant, involved a claim against a Jeffrey Farkas (Farkas), the president of a corporate apartment building owner, for injuries sustained by two infant residents as a result of lead paint hazards. At trial, Farkas relied on his affirmative defense that, since he acted on behalf of the corporation, he could not be held individually liable. The Appellate Division held that Farkas had the burden of proving his affirmative defense at trial, and failed to meet his burden by demonstrating that his alleged negligence consisted solely of nonfeasance. Instead, he argued "inaccurately and more generally that personal liability could not be imposed upon him because he acted in his capacity as an officer of the Corporation." *Peguero*, 58 AD3d at 559. As a result of that failure, as well as the failure to object to the court's charge, which did not distinguish between the negligent failure to act and affirmative acts of negligence, Farkas was found liable. Nonetheless, the Appellate Division ordered a new trial in the interests of justice to give him an opportunity to establish at the retrial that his alleged negligence consisted merely of nonfeasance, since the court found it unlikely that plaintiffs would be able to respond by offering evidence demonstrating a basis upon which to hold Farkas individually liable.

In the instant case, leaving aside the fact that movants did not plead in their answer any limitation on their individual liability as a result of their relationship with Residential, no affidavits have been presented by any of them asserting that they cannot be held individually liable because any alleged negligence on their part consisted solely of nonfeasance, despite the fact that the complaint (¶¶ 129, 147, 165) alleges that each individual movant engaged in negligent acts and omissions.[3] Instead, the individual movants' counsel merely argued that plaintiffs would be unable to establish that the corporate veils should be pierced. I also note that the opposing papers appear to raise an issue, which is not refuted in the reply papers, as to whether Beck engaged in misfeasance. *See Espinosa v Rand,* 24 AD3d at 102-103 (summary judgment denied to officer of a corporate building owner in lead paint poisoning case where mother alleged that she told

[3] As previously noted, there was apparently a bill of particulars, which has not been submitted by movants. Thus, the extent and nature of the claims against the individual movants are unclear.

officer of fear that apartment presented a lead paint poisoning hazard, and officer allegedly told mother not to worry, since lead paint had not been used in premises for more than 10 years). While in this case, as in *Peguero*, it is doubtful that plaintiffs will prevail at trial in their claims against the individual movants, movants have not met their prima facie burden on this summary judgment motion of demonstrating that their alleged negligence constituted solely nonfeasance. Thus, their application must be, and hereby is denied, irrespective of the adequacy of the opposing papers.

This leaves the branch of the motion which seeks summary judgment on behalf of all the movants[4] on the limited grounds that Powell alone created the hazardous lead paint condition by negligently performing or having performed lead paint abatement, including during the time period when Asbestway was engaged in abatement, and caused that abatement work to be delayed because she was concerned with the apartment's architectural integrity. Movants' counsel adds in the memorandum of law that movants are entitled to summary judgment because, once the notice to abate was issued, they acted promptly to abate, thereby allegedly establishing that they acted reasonably as a matter of law under the Administrative Code of the City of New York § 27-2013 (h), which does not impose absolute liability, and requires a plaintiff to ultimately establish that the defendants were negligent. *Juarez v Wavecrest Management Team Ltd.,* 88 NY2d at 643-644.

This branch of the motion is denied as well, since movants have failed to meet their prima facie burden of establishing their entitlement to the requested relief, by refuting the material allegations of the complaint as to negligence and causation. *See Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007) (defendant did not meet prima facie burden on summary judgment where he failed to address the factual allegations of the complaint and bills of particulars). In essence, all that movants did was address their comparative negligence claim (*see generally M.F. v Delaney*, 37 AD3d 1103 (4th Dept 2007); *Cantave v Peterson*, 266 AD2d 492 (2d Dept 1999) against Powell, without eliminating their alleged negligence as a cause of Sydney's exposure to lead paint hazards and of her alleged injuries. Movants did not even attempt to refute the material allegations of the complaint.

Moreover, movants' have not established, through an expert's affidavit, that any exposure caused by Powell's paint removal activities was a substantial factor in causing Sydney's alleged injuries. *See generally Samuel v Aroneau*, 270 AD2d 474 (2d Dept 2000). To the extent that movants rely on Morriss's deposition testimony to show causation, it is unavailing, because he only testified that the sanding of parts of some pocket doors "potentially" exposed Powell, adults and children to lead, and he was unsure of how much dust was generated in the process. *See Wong v Goldbaum,* 23 AD3d 277 (1st Dept 2005) (expert's opinion is not probative where the assertions are speculative); *Samuel v Aroneau,* 270 AD2d at 704 (expert's opinion must be based on personal knowledge of the facts or facts in the record).

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[4] On this branch of the motion, movants' counsel does not distinguish among each defendant. Accordingly, they shall be treated as one for purposes of this branch.

In any event, Powell submitted evidence denying that her activities exposed Sydney to a lead paint hazard. In particular, she denied that her activities or those undertaken on her behalf created paint dust or chips, and denied that she used a heat gun (which if used above a certain temperature [*see* Rabkin ebt, at 112-113] might produce vapors) to strip paint in her apartment. Even had Powell used a heat gun, movants have provided no evidence that its temperature was excessive.

In addition, the fact that Powell may have caused a delay in Asbestway's abatement work, or may have, through her own abatement work at the time that Asbestway was performing abatement, disrupted the integrity of Asbestway's precautionary measures, is unavailing, since it is undisputed that Sydney resided in a safe house from November of 2002 until about June 2003, by which time Asbestway's work was done, and approved by the Department of Health. Further, Sydney's blood lead levels were at their highest before the order to abate was issued. Therefore, it does not seem that Sydney was affected as a result of any delay or disruption of Asbestway's work site caused by Powell.

Nor have movants established that Powell's activities were the sole cause of the apartment's lead paint hazard, where they have failed to address the claims of peeling paint in the apartment, which were allegedly not promptly addressed, despite Powell's requests; the creation of paint dust and debris by the activities of the building's agents; and the damaged and/or chipped paint in excess of the regulatory limits found on 57 surfaces in the apartment by the Department of Health, not all of which damage was attributable to Powell's alleged activities.

To the extent that movants' counsel seeks summary judgment in the memorandum of law on the ground that movants acted reasonably, and thus, were not negligent under the Administrative Code of the City of New York § 27-2013 (h) (a codification of Local Law 1 of 1982 [Local Law 1]), because they acted promptly once the notice to abate was issued, that argument is similarly unavailing. Therefore, this branch of their motion is denied for the reasons which follow. However, before discussing the merits of this branch of the motion, some background history regarding Local Law 1 is necessary.

Local Law 1 provides, in relevant part, that:

> (h) (1) The owner of a multiple dwelling shall remove or cover ... any paint ... having a reading of 0.7 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead based on the non-volatile content of the paint ... on interior walls, ceilings, doors, window sills or moldings in any dwelling unit in which a child or children six (6) years or under reside.
>
> (2) In any multiple dwelling erected prior to January first, nineteen hundred sixty in which paint or other similar surface-coating material is found to be peeling on the interior walls, ceilings, doors, window sills or moldings in any dwelling in which a child or children six (6) years of age or under reside, it shall be presumed that the peeling substance contains more than the 0.5 percent of metallic lead based on the non-volatile content of the paint or other similar surface-coating material or having a

reading of 0.7 milligrams of lead per square centimeter or greater.

"Peeling" under Local Law 1 includes chipping (*see Concepcion v Walsh,* 38 AD3d 317 [1st Dept 2007]), and presumably also includes paint that is "cracking, scaling, flaking, blistering, ... or loose in any manner" (*see* New York City Health Code § 173.14 [19]). Under Local Law 1, lead paint is considered a hazard when an amount which exceeds the specified threshold exists, and a child under the age of seven resides in the apartment. *Juarez v Wavecrest Management Team Ltd.,* 88 NY2d at 646.

In order to be liable, the defendant needs constructive or actual knowledge of the hazard and that a child under the age of seven lives in the apartment. *Ibid.* The plaintiff must ultimately show that the defendant had such notice of the condition for sufficient time that it ought to have been remedied. *Ibid.* Therefore, "liability turns on the reasonableness of a landlord's efforts to ameliorate or prevent a dangerous lead condition." *Id.* at 644. Local Law 1 gives landlords the right to enter apartments in which children under the age of seven reside to inspect for and repair any lead paint hazard. *Id.* at 647. The defendant may be "charged with constructive notice of defects in those parts of the building into which it has authority to enter." *Ibid.*; *Rivas v 1340 Hudson Realty Corp.,* 234 AD2d 132 (1st Dept 1996).

Local Law 1 also sets forth a presumption that, if a unit in a building constructed before 1960 is occupied by a child under the age of seven, peeling paint constitutes a hazardous lead paint condition. *Juarez v Wavecrest Management Team Ltd.,* 88 NY2d at 647.

In 1999, Local Law 1 was repealed and replaced by Local Law 38 (New York City Administrative Code § 27-2056.1, *et seq.*). Local Law 38 "replaced total abatement of lead-based paint with monitoring and containment." *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone,* 293 AD2d 85, 89 (1st Dept 2002), *revd on other grounds* 100 NY2d 337 (2003).

Under Administrative Code of the City of New York § 27-2056.1 (a) (2), lead-based paint hazards were required to be abated and were defined as

> (i) paint that is lead-based paint that is peeling on any surface in a dwelling unit in a multiple dwelling, in which dwelling a child under six years of age resides or (ii) paint that is presumed to be lead-based paint pursuant to section 27-2054.4 of this article that is peeling on any surface in a dwelling unit in a multiple dwelling in which dwelling a child under six years of age resides or (iii) paint that is either lead-based paint or presumed to be lead-based paint pursuant to section 27-2056.4 of this article and is on a deteriorated subsurface in a dwelling unit in a multiple dwelling in which dwelling a child under six resides.

Administrative Code of the City of New York § 27-2056.4 provided in relevant part that:

> Presumption. a. In any dwelling unit in a multiple dwelling erected prior to

> January first, nineteen hundred sixty in which a child under six years of age resides, it shall be presumed that the paint or other similar surface coating material in the interior of the dwelling unit is lead based paint solely for the purposes of this article.

Under Administrative Code of the City of New York § 27-2056.1 (a) (4), peeling meant that "the paint or other surface-coating material [was] curling, cracking, scaling, flaking, blistering, chipping, chalking or loose in any manner." Administrative Code of the City of New York § 27-2056.2 required owner's to correct all lead-based paint hazards.

At the time that Powell negotiated her lease and moved into the apartment in January 2000, Local Law 38 was in effect. However, in October 2000, Local Law 38 was invalidated by a New York State Supreme Court ruling. *See Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 2000 WL 35489684 (Sup Ct NY County 2000), *revd* 293 AD2d 85 (1st Dept 2002), *revd* 100 NY2d 337 (2003). Plaintiffs' counsel asserts, and movants' counsel does not deny, that, as a result, Local Law 1 was thereby revived and was in effect when Sydney was first diagnosed with an elevated blood lead level. By decision dated March 26, 2002, the Appellate Division reversed the Supreme Court's decision, thereby reinstating Local Law 38. *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone,* 293 AD2d at 85, *revd* 100 NY2d 337. Ultimately, the Court of Appeals, in July 2003, after the apartment's lead was abated by Asbestway, and Sydney returned to live there, reversed the Appellate Division's decision and held that Local Law 38 was null and void, thereby reviving Local Law 1 by operation of law. *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337.

After reviewing the relevant regulatory schemes, it is readily apparent that movants' application to dismiss, on the ground that they acted reasonably to abate the lead paint hazard once they received the notice of violations and order to abate, must be and hereby is denied. Movants have offered no evidence eliminating the issues raised by the complaint, demonstrating that they acted reasonably and were not negligent under either regulatory scheme, and did not cause injury to Sydney before the notice to abate was issued. *See Allison v Bay Realty Corp.*, 172 Misc 2d 480, 485 (Sup Ct, Queens County 1997) (where defendants had notice of a lead paint condition and that a child under the age of seven lived in the apartment, they were required to abate the condition before receiving the notice to abate); *see also Juarez v Wavecrest Management Team Ltd.*, 88 NY2d at 648; *Woolfalk v New York City Housing Authority,* 263 AD2d 355, 356 (1st Dept 1999) (defendant having notice that a child under the age of seven resided in the apartment can be charged with constructive notice of a lead paint hazard before receiving a notice to abate).

Movants fail to demonstrate, and do not even attempt to demonstrate, that, before receipt of the notice of violations and order to abate, they lacked actual or constructive knowledge of a lead paint hazard in the apartment, and that a child under the age set forth in either regulatory scheme resided in the apartment. They do not establish that they acted reasonably and timely with respect to inspecting the apartment. *See also Rodriguez v Amigo,* 244 AD2d 323, 325 (2d Dept 1997) ("[k]nowledge of a dangerous condition in one portion of the structure may have imposed upon the owners [a duty] to examine other portions of the structure for defects arising from the same cause, and to ascertain what was

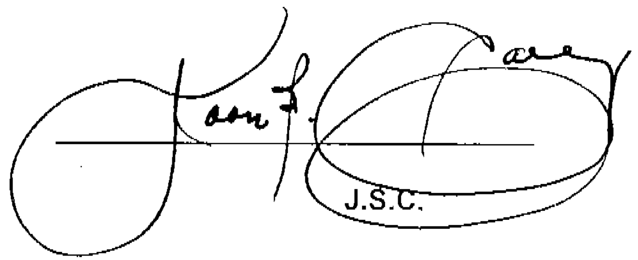
ascertainable with the exercise of reasonable care"). They also fail to address the claims regarding the apartment's peeling and damaged paint, including lead paint in concentrations in excess of the regulatory limits, the defendants' agents' alleged creation of dust and debris during their work in the apartment, and the alleged complaints by Powell, which, according to her, were improperly, and untimely addressed. Movants have, therefore, failed to meet their burden on this branch of the motion, which requires that it be denied, irrespective of the adequacy of the opposing papers. *Jolicoeur v Great Oaks Associates, Ltd.*, 43 AD3d 872 (2d Dept 2007).

In conclusion, it is

ORDERED that this motion for summary judgment made on behalf of Graham Court Owners Corp., Residential Management Inc., Sam Beck, Joshua Frankel, and Labe Twerski is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on December 3, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 11/10/2009



J.S.C.

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