Williams v Singh
2010 NY Slip Op 33191(U)
November 16, 2010
Sup Ct, Albany County
Docket Number: 7499-08
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

AARON WILLIAMS and JOSHUA WILLIAMS,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 7499-08
RJI NO. 01-09-97653

MADHO SINGH, VIJAYA W. SINGH,
and MARY HELEN DEAN,

Defendants.

Supreme Court Albany County All Purpose Term, October 8, 2010
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Plaintiffs commenced this action seeking to recover damages for the personal injuries they allegedly sustained due to their exposure to lead paint. Issue was joined by defendants, discovery has been completed and a trial date certain has been set.

Plaintiffs move for summary judgment on the issue of negligence against all defendants, dismissing many of the affirmative defenses asserted by defendants and precluding any testimony from two experts retained by the defendants or in the alternative holding a Frye hearing. The motion is opposed by all defendants. Plaintiffs failed to establish a right to summary judgment of liability or dismissing all of the affirmative defenses and have failed to demonstrate their entitlement to preclusion or to a *Frye* hearing.

SUMMARY JUDGMENT STANDARD

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On each parties' motion for summary judgment, the movant "bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form... [, which] burden may not be met by pointing to gaps in [the non-movant's] proof." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Wynn ex rel. Wynn v. T.R.I.P. Redevelopment Associates, 296 AD2d 176 [3d Dept. 2002]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Moreover, in order to obtain summary judgment dismissing the affirmative defenses, plaintiffs must submit evidence which negates any meritorious defense encompassed by the pleadings (see e.g. Franceschi v. Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v. Bert's Bikes and Sports, 227 AD2d 956

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[4th Dept 1996]; Wilder v. Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]).

If the movants establish their right to judgment as a matter of law, the burden then shifts to the opponents of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

As is applicable in this lead-based paint case, "in the absence of proof that an out-of-possession landlord had actual notice of the existence of a hazardous condition caused by a lead-based paint being used on the landlord's premises, a plaintiff can show the existence of a question of fact with respect to whether the landlord had constructive notice of that condition by showing that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (Charette v. Santspree, 68 AD3d 1583 [3d Dept. 2009], quoting Chapman v. Silber 97 NY2d 9 [2001][internal quotation marks omitted]; see also Byrd v. 2015 Caton Ave., LLC, 57 AD3d 933 [2d Dept. 2008][notice of a child residing in the apartment]; Duarte v. Community Realty Corp., 42 AD3d 480 [2d Dept. 2007][notice of a child residing in the apartment]; Cunningham v. Spitz, 218 AD2d 639 [2 Dept. 1995][lead exposure]; Haggray v. Malek, 21 AD3d 683 [3d Dept. 2005]).

The Court of Appeals stated "We hold only that a landlord who actually knows of the existence of many conditions indicating a lead paint hazard to young children may, in the minds of the jury, also be charged constructively with notice of the hazard." (Chapman v. Silber 97 NY2d at 21). Even though all five elements were met in Chapman, the Court did not search the

record and grant partial summary judgment on this issue. Rather, it specifically held that meeting all five elements created a question of fact with respect to constructive notice. Plaintiffs have not cited nor has the Court found any appellate authority for granting summary judgement to plaintiffs based solely upon the Chapman standards rather than New York City laws and regulations.

Furthermore, plaintiffs do not meet their burden by showing a possibility of chipping or peeling paint based upon prior instances of chipping paint which had been abated but which might reoccur. They are required to show actual knowledge of a current condition of peeling or chipping paint (see Charette v. Santspree, 68 AD3d 1583; Wynn v. T.R.I.P. Redevelopment Assoc., 296 AD2d at 181) even when there has been prior notice of a lead paint hazard with approved abatement (see Robinson v. Scafidi, 23 AD3d 827, 828 [3d Dept 2005]).

PLAINTIFFS' SUMMARY JUDGMENT MOTION

Here, plaintiffs failed to demonstrate their entitlement to judgment as a matter of law. At best, proof of the five Chapman prongs would show a question of fact with respect to constructive notice. They have not even conclusively established all five prongs. The motion is primarily premised upon documentary evidence of prior instances of chipping lead paint in the defendants' premises. However, there is no evidence that defendants were aware that there was chipping paint in the apartments during the plaintiffs' tenancies prior to notice from the Albany County Department of Health. Plaintiffs have not shown that defendants failed to abate the conditions within a reasonable period of time after receiving notice. Plaintiffs also rely upon statements made by Madho Singh in his deposition to the effect that he knew that "young children" lived in the apartment. However, no information is provided as to when he obtained

such knowledge and the transcript of his deposition indicates that he received such knowledge in the reports from the Health Department. Furthermore, the clear intent of the holding in Chapman was that notice to a landlord that children who were of an age at high risk for lead poisoning lived in the apartment could support liability. Such age has been established by law and regulation to range from six months to six years (see e.g. Matter of New York City Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 342-344 [2003]; 10 NYCRR § 67-1.2). Plaintiffs have not offered any proof that defendants Singh knew that any young children within such age range lived in the apartment. With respect to defendant Dean, plaintiffs rely upon statements made during her deposition to the effect that she was told at the time she rented the apartment to the plaintiffs' mother that there would be children in the apartment. As with defendants' Singh, there is no proof that defendant Dean was aware of their ages. Plaintiffs have therefore failed to meet their burden of establishing liability on the part of any of the defendants. Accordingly the motion for summary judgment on the issue of liability is denied.

MOTIONS TO DISMISS AFFIRMATIVE DEFENSES

The first affirmative defense of defendant Madho Singh alleges culpable conduct by the plaintiffs or others prior to and at the time of the incidents in question. At all times relevant to the infant plaintiff's exposure to lead at defendant's premises, they were only a few years old. To the extent that the affirmative defense of culpable conduct is addressed to the infant plaintiff's conduct during those years, it is "not available *** because infants of such young age are non sui juris as a matter of law (see Verni v Johnson, 295 NY 436, 437-438; Boyd v Trent, 297 AD2d 301, 302- 303; Smith v Sapienza, 115 AD2d 723, 724; cf. Estate of Pesante v County of Seneca, 1 AD3d 915, 917-918)." (M.F. v Delaney, 37 AD3d 1103, 1104-1105 [4th Dept 2007]).

Moreover, to the extent that they seek to claim responsibility by third parties, there is no indication of facts which would eliminate liability on the part of defendant Madho Singh. As such, the first affirmative defense asserted by Madho Singh is dismissed.

The second and third affirmative defenses of defendant Madho Singh allege a failure to mitigate damages. Plaintiffs have not offered any evidence in support of dismissal, but rather rely upon their ages. However, mitigation may include culpable conduct at a much later time, such as failure to attend school, failure to obtain medical treatment or failure to obtain gainful employment. Plaintiffs have failed to meet their burden on this issue.

Finally, plaintiffs seek dismissal of the sixth affirmative defense which alleges an absence of actual or constructive notice. It has already been determined that plaintiffs have failed to establish either actual or constructive notice. As such they have not shown any entitlement to dismissal of the defense. Accordingly the motion to dismiss the second, third and sixth affirmative defenses is denied.

Plaintiffs seek dismissal of the first affirmative defense of defendants Madho and Vijaya Singh which alleges lack of personal jurisdiction. Plaintiffs have submitted affidavits of service upon the Singhs and said defendants have not addressed this aspect of the motion. Accordingly, the first affirmative defense of the Singh defendants is dismissed. Plaintiffs have also established that the action was timely commenced based upon the toll for infancy provided by CPLR § 208. Accordingly, the second first affirmative defense is dismissed.

The motion to dismiss the second affirmative defense of lack of actual or constructive notice and third affirmative defense of failure to mitigate damages is essentially identical to the motion with respect to defendant Madho Singh and is denied.

Defendant Dean has raised similar affirmative defenses. The affirmative defense of lack of personal jurisdiction has been withdrawn. For the reasons stated above the first, fourth and fifth affirmative defenses of the statute of limitations and culpable conduct by the plaintiffs or other parties are dismissed. The second affirmative defense alleges laches. However, "laches is a purely equitable defense which may not be interposed in an action at law" (Brown v. Lockwood, 76 AD2d 721, 729 [2d Dept 1980]; see also Fade v. Pugliani/Fade, 8 AD3d 612, 614-615 [2d Dept 2004]; Matter of County of Rockland v. Homicki, 227 AD2d 477 [2d Dept 1996]). The second affirmative defense is therefore dismissed.

The seventh affirmative defense alleges a failure to state a cause of action. The complaint alleges negligence by defendant Dean together with injury proximately caused by such negligence. As such, the defense is without merit and is dismissed.

The twelfth affirmative defense alleges an intervening and/or superceding event.

> "While the issue of proximate cause is ordinarily for the jury to resolve, it may nevertheless be determined as a matter of law that a defendant's conduct was not the proximate cause of injury if the evidence conclusively establishes that there was an intervening act which was so extraordinary or far removed from the defendant's conduct as to be unforeseeable (see, Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315); a plaintiff's undeniably reckless behavior has been held to constitute such an unforeseeable act (see, Kriz v Schum, 75 NY2d 25, 34)." (Meseck v General Elec. Co., 195 AD2d 798, 800 [3d Dept 1993]; see also Decker v Forenta LP, 290 AD2d 925 [3d Dept 2002]).

The answer does not allege that any such extraordinary and unforeseeable event occurred, nor does the record include any evidence of such an event. Accordingly, the twelfth affirmative defense is dismissed.

The thirteenth affirmative defense alleges that plaintiffs assumed the risk. As with the defense of culpable conduct, the plaintiffs were too young for such defense to be applicable

(M.F. v Delaney, 37 AD3d at 1104-1105). The fourteenth affirmative defense alleges that plaintiffs failed to name necessary parties. Defendant Dean has not indicated what other party is necessary and it appears that the only other parties which may have been contemplated are joint tortfeasors. However, joint tortfeasors need not be sued together (see Peak v. Bartlett, Pontiff, Stewart & Rhodes, P.C., 28 AD3d 1028, 1030 [3d Dept 2006]). As such, these affirmative defenses are without merit and are dismissed.

The sixth affirmative defense in defendant Dean's answer alleges a failure to mitigate damages. As above, plaintiff has failed conclusively to establish that such defense is without merit. The motion to dismiss such defense is therefore denied.

MOTION FOR PRECLUSION OF EXPERT TESTIMONY

Finally, considering the plaintiffs' motion seeking to preclude the defendants' experts from testifying at trial, or in the alternative for a *Frye* hearing, the motions are denied.

"To be properly admitted, expert opinion evidence must generally be based upon facts either found in the record, personally known to the witness, derived from a 'professionally reliable' source or from a witness subject to cross-examination." (McAuliffe v. McAuliffe, 70 AD3d 1129 [3d Dept. 2010], quoting Brown v. County of Albany, 271 AD2d 819 [3d Dept. 2000], lv. denied 95 NY2d 767[2000]; O'Brien v. Mbugua, 49 AD3d 937 [3d Dept. 2008]). A challenge to the foundation of an expert's testimony focuses on the "specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial." (Jackson v. Nutmeg Technologies, Inc., 43 AD3d 599 [3d Dept. 2007]; quoting People v Wesley, 83 NY2d 417 [1994]). Moreover, where a party challenges the "credibility of the opinions of... [an] expert and not the reliability of novel

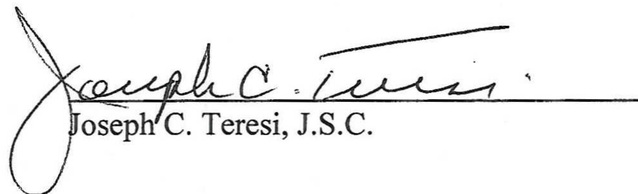
scientific evidence presented" no *Frye* hearing is required. (Page v. Marusich, 51 AD3d 1201 [3d Dept. 2008]).

While the expert opinions offered by plaintiffs significantly challenge the weight to be accorded defendants' experts' opinions, they do not demonstrate that such opinions were inadmissible. Plaintiffs' submissions fail to substantiate the claim that the views expressed by defendants' experts are out of the main stream or to demonstrate that such opinions are based on "novel scientific evidence." (Page, supra). While Plaintiffs demonstrated certain scientific views of lead poisoning's effect on children, such proof failed to connect defendants' experts' opinions to "novel scientific evidence." As such, Plaintiffs neither demonstrated their entitlement to preclusion of the expert testimony or the necessity for a *Frye* hearing. (Page, supra). Accordingly, Plaintiffs' motion for preclusion, or alternatively a *Frye* hearing, is denied.

This Decision and Order is being returned to the attorneys for defendant Dean. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 16, 2010
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 9, 2010.
2. Affirmation of Mo Athari, dated September 9, 2010, with attached Exhibits A-Z and A-B.
3. Affirmation of Susan Blatt, M.D., dated September 8, 2010, with attached Exhibits A-C.
4. Affidavit of Andy Lopez-Williams, Ph.D., dated September 9, 2010, with attached Exhibits A-E.
5. Affirmation of Paul Briggs, dated October 6, 2010, with attached Exhibits A-D.
6. Affidavit of Catherine P. Ham, dated October 7, 2010.
7. Affidavit of Jennifer Dominelli Lecakes, dated October 8, 2010.
8. Affirmation of Walter J. Molofsky, M.D., dated October 6, 2010, with attached Exhibit A.
9. Affidavit of David Masur, Ph.D., dated October 8, 2010.
10. Reply Affirmation of Mo Athari, dated October 18, 2010, with attached Exhibits A-D.