

Lowman v AKS 183rd Realty Corp.

2010 NY Slip Op 33919(U)

July 14, 2010

Sup Ct, Bronx County

Docket Number: 20917/05

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

JSC

W.W.

PART II

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

Lowman, Vincent Jr.
-against-

Index No. 8133-2001

Hon. LAURA G. DOUGLAS
JUSTICE, SUPREME COURT

AKS 183rd St. Realty

Justice.

The following papers numbered 1 to Read on this motion.
Noticed on 1-30-09 and duly submitted as No. on the Motion Calendar of

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
<u> </u> Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion is decided in accordance with
the annexed decision of the Court

RECEIVED
BRONX COUNTY CLERK'S OFFICE

JUL 15 2010

PAID

NO FEE

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/14/10

Hon. *JSC*
J.S.C.

LAURA G. DOUGLAS
JUSTICE, SUPREME COURT

ea 179

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No.: 20917/05

VINCENT LOWMAN, JR., an infant by his m/n/g
CHANEL THORNTON, and CHANEL THORNTON,
Individually,

Plaintiffs,

DECISION/ ORDER

-against-

AKS 183rd REALTY CORP., and 1211 WHEELER,
LLC.

Defendants.

DOUGLAS, HON. LAURA

Defendant, 1211 Wheeler LLC., (hereinafter "1211 Wheeler"), moves for the following; (1) an order striking the plaintiff's Complaint, pursuant to CPLR §3126, or alternatively, conditionally precluding plaintiffs for failure to respond to Court orders directing them to provide evidence of the existence of a hazardous lead paint condition and notice of same to defendant 1211 Wheeler; and (2) for a protective order, pursuant to CPLR §3103, vacating and setting aside that portion of this Court's Order dated October 20, 2008, section (4) sub.(4) directing that an accountant for 1211 Wheeler provide an Affirmation of Search for the records of the superintendent of the building in question, on the ground that the requested information is privileged material; or, in the alternative, deeming the letter to plaintiff's counsel dated November 11, 2008 produced in response to the Order as full compliance with same; and (3) extending the time for defendant to further respond to insurance coverage information, per Court Order dated October 20, 2008. Plaintiff has submitted opposition papers. Defendant's motion is decided as set forth below.

Although this case has a long and complex procedural/discovery history, for the purposes of the instant motion, the Court does not feel it necessary to restate the extensive history of this action. It will suffice to briefly state that this is a personal injury action, brought by Chanel Thornton, (hereinafter "plaintiff"), on behalf of herself and her son, Vincent Lowman, (hereinafter "infant plaintiff"), to recover damages for injuries allegedly sustained by infant plaintiff as a result of exposure to lead based paint while infant plaintiff resided at defendants' premises located at 1211 Wheeler Avenue, Apt 10, Bronx, New York, and 540 East 183rd Street, Apt C-3, New York, New York, respectively.

That branch of defendant's motion which moves to dismiss plaintiff's complaint for failure to provide evidence of the existence of a hazardous lead paint condition, and notice of same, to defendant 1211 is denied. Plaintiffs argue that they have provided ample evidence of the existence of a hazardous lead paint level in the subject apartment. In addition, according to §27-2103 of the New York City Administrative Code, and case law, there is a presumption that chipping or peeling paint, in an apartment in a multiple dwelling built before 1960, located within the five boroughs of New York City, where a child under the age of seven resides, contains lead. *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996). Further, defendant 1211, in its Reply Affirmation, ¶ 7, acknowledges receiving the necessary documents, rendering defendant's request moot.

That branch of defendant's motion which seeks a protective order for that portion of this Court's previous Order, dated October 20, 2008, that required defendant 1211 to provide the name and address of the superintendent of the subject premises, or an

Affidavit of Search from its accountant detailing his search for that information, is granted to the limited extent that the accountant for defendant does not have to provide an Affidavit of Search regarding the name and address of the superintendent of the subject premises. Defendant 1211 requested, and plaintiff did not object to, an *in camera* discussion with the Court regarding the privileged nature of the required Affidavit. After having a discussion with defendant 1211's attorney, the Court is constrained not to reveal the exact nature of the privilege given the possibility of violating the Fifth Amendment right of a person to not answer or provide information that might incriminate that person. Suffice it to say that this Court is satisfied that such information, from the accountant for defendant 1211, is indeed privileged and, therefore, the accountant for defendant 1211 need not provide the subject Affidavit of Search. However, defendant 1211 is precluded from producing the superintendent as a witness at trial.

That branch of defendant's motion which seeks an extension of time to further respond/provide insurance information is denied as moot. Defendant has provided the necessary documents during the pendency of this motion.

This constitutes the decision and order of the Court.

Dated: July 14, 2010



Hon. Laura Douglas