

**Rodriguez v KPV Realty LLC**

2011 NY Slip Op 30288(U)

January 14, 2011

Sup Ct, NY County

Docket Number: 112127/08

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 112127/2008  
**RODRIGUEZ, CINDY**  
vs.  
**KPV REALTY**  
SEQUENCE NUMBER : 003  
EXTEND TIME

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
JAN 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

*motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.*

*Cc scheduled for 3/10/11 @ 9:30 a.m.*

Dated: JAN 14 2011

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
CINDY RODRIGUEZ, an Infant by her Mother  
and Natural Guardian, ANA RODRIGUEZ, and  
ANA RODRIGUEZ, Individually,

Plaintiff,

**-against-**

KPV REALTY LLC, PRANA-BF PARTNERS, a  
California Limited Partnership, 507 W. 179<sup>TH</sup>  
REALTY LLC, SUNLIL PROPERTIES, SUNLIL  
PROPERTIES LLC, MILBROOK PROPERTIES  
LTD., and ET MANAGEMENT & REALTY CORP.,

Defendants.  
-----X

**DECISION/ ORDER**  
Index No.: 112127/08  
Seq. No.: 001 002 003

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

PAPERS	NUMBERED
<b>Seq #001</b>	
Def Sunlil, Milbrook's n/m [3212] w/ALM affirm, VRR affid, exhs . . . . .	1
Pltf opp w/RG affirm, exhs . . . . .	2
Def Sunlil, Milbrook's reply w/ALM affirm . . . . .	3
Def ET's opp w/CMV affirm . . . . .	4
Def Sunlil, Milbrook's reply to ET w/ALM affirm, exhs . . . . .	5
Def KPV, 507's opp/support w/SMW affirm . . . . .	6
<b>Seq #002</b>	
Def KPV, 507's n/m [3212] w/SMW affirm, YA,KV,MO,VC affids, exhs	7
Pltf opp w/RG affirm, exhs . . . . .	8
Def KPV, 507's reply w/SMW affirm . . . . .	9
<b>Seq #003</b>	
Pltf n/m [extend NOI] w/ RG affirm . . . . .	10

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**FILED**  
**JAN 19 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE

**GISCHE J.:**

This is an action brought on behalf of Cindy Rodriguez, an infant ("Rodriguez"), to recover monetary damages for personal injuries resulting from exposure to lead based paint that she allegedly sustained as a result of defendants' negligence. Presently before the court are three motions. They are as follows: Sunlll Properties, Sunlll Properties LLC (collectively "Sunlll"), and Milbrook Properties LTD's ("Milbrook") motion for summary judgment dismissing plaintiff's complaint (Seq. No. 001); KPV Realty LLC ("KPV") and 507 W. 179<sup>th</sup> Realty, LLC's ("507 Realty") motion for summary judgment dismissing plaintiff's complaint (Seq. No. 002); and plaintiff's motion to extend its time to file the Note of Issue (Seq. No. 003). ET Management & Realty Corp. ("ET Management") opposes Sunlll, Milbrook, KPV, and 507 Realty's motions for summary judgment as being premature due to the fact that there is outstanding discovery.

Since the moving defendants have answered<sup>1</sup> the complaint and these motions are all brought pre-note of issue, they are timely and will be decided on the merits. CPLR § 3212 (a); Brill v. City of New York, 2 N.Y.3d 648 (2004); Myung Chun v. North American Mortgage Co., 285 AD2d 42 (1st Dept. 2001). Furthermore, the motions for summary judgment and plaintiff's motion to extend time to file the Note of Issue are consolidated for consideration and decision in this decision and order.

**Facts and Arguments**

Plaintiff, an infant, born on November 8, 1994, resided at 507 West 179<sup>th</sup> Street

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<sup>1</sup> Prana-BF Partners, a California Limited Partnership has not appeared in this action nor has he taken any position on these motions.

(the "Building") in apartment 5A (the "Apartment") from the date of her birth. From August 30, 1988 through July 22, 1999, the Building was owned by Sunlil and managed by Milbrook. The Building was sold, by deed, to Prana-BF on July 22, 1999. On July 29, 2003, KPV purchased the Building, and on August 9, 2004, the Building was owned by 507 Realty. Plaintiff claims that she was exposed to lead paint from her date of birth until present.

Plaintiff asserts three causes of action in her complaint, dated August 11, 2005, against KPV, Prana-BF, and 507 Realty. These claims are for negligence and loss of companionship to her mother, Ana Rodriguez ("Action 1"). Plaintiff asserts two causes of action, in a verified complaint, dated August 27, 2008, against Sunlil and Milbrook for negligence and failure to disclose ("Action 2"). Action 1 and Action 2 were consolidated by this Court on June 25, 2009 (Order, Hon. Judith J. Gische, 6/25/09).

Plaintiff alleges that she was exposed to lead based paint in the Apartment from November 8, 1994 through May 8, 2003, and was ultimately diagnosed with lead poisoning. Plaintiff states that on May 8, 2003, the City of New York's Department of Health and Mental Hygiene ("DOHMH") inspected the Apartment and found multiple lead paint hazards in the Apartment and issued an order to abate. Plaintiff states that a blood test revealed her lead level was 17 mcg/dl in February 2003; 16 mcg/dl in March 2003; and 21 mcg/dl in April 2003.

According to plaintiff, discovery is incomplete, as depositions have not yet been conducted. She also claims that even if the motions are ripe for consideration, there are triable issues of fact.

Sunlil and Milbrook argue that plaintiff cannot establish a *prima facie* case of

negligence because plaintiff did not have an elevated level of lead until 2003, which was after Sunlil and Milbrook sold the Building to Prana-BF. Sunlil and Milbrook contend that, since they sold the property in 1999 and were no longer owners of it, they are not responsible for plaintiff's elevated lead level in 2003. Sunlil and Milbrook provided the affidavit of Victoria R. Rossi ("Rossi"), Director of Administration for Milbrook, who states that Sunlil owned and Milbrook managed the Building from August 30, 1988 through July 22, 1999, at which time it was sold to Prana-BF. Rossi states that the Apartment was regularly maintained and was free of peeling paint during Sunlil's ownership period. Rossi also states that Sunlil and Milbrook never received an Order to Abate from DOHMH and that no testing was ever performed to confirm the presence of lead. Rossi contends that if any lead paint did exist in the Apartment, it was properly encapsulated.

KPV and 507 Realty argue that no lead hazard existed during the time period that either party owned the Building. KPV and 507 Realty provide the affidavits of Yma Andries ("Andries"), Deputy Director of DOHMH; Kostandinus Vorillas ("Vorillas"), member of KPV; and Mitchell Ozerl ("Ozerl"), member of 507 Realty.

Andries states that on May 8, 2003, four areas within the Apartment tested positive for lead and that on May 13, 2003, an Order to Abate was sent to Prana-BF. On May 28, 2003, DOHMH performed an inspection and found that the Apartment was still not abated. A final notice to abate was then sent to Prana-BF on June 3, 2003. On July 3, 2003, DOHMH performed another inspection and found that the violations were corrected. On July 9, 2003, DOHMH sent a letter to Prana-BF stating that the Apartment was now abated. Andries states that no other orders to abate have been

issued by any administrative body regarding lead paint the Apartment, nor has anyone in the Apartment complained of a condition (peeling paint, etc.) in the Apartment.

Vorillas and Ozeri each state that while KPV and 507 Realty owned of the Building, no orders to abate the Apartment were issued and, therefore, no lead abatement of the Apartment took place or was necessary.

Vincent Coluccio ("Coluccio"), Doctor of Public Health opines that, in his expert opinion, no lead paint hazards existed and plaintiff was not exposed to lead in the Apartment during KPV and 507 Realty's ownership period. Coluccio bases his opinion on a Lead Hazard Report issued by the DOHMH, dated May 12, 2003, in which the surfaces that tested positive were identified as being in "fair" condition, meaning that there were "minor defects [that] should be repaired and/or monitored, but are not considered to be 'lead-based paint hazards'."

#### **Law Applicable to Motions for Summary Judgment**

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1<sup>st</sup> Dept 2003).

On a motion for summary judgment, it is for the court to decide any issues of law that are raised. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept 2003).

## Discussion

NYC Code § 27-2056.5<sup>2</sup> provides, as follows:

a. In any multiple dwelling erected prior to January 1, 1960, it shall be presumed that the paint or other similar surface-coating material in any dwelling unit where a child of applicable age resides or in the common areas is lead-based paint. The presumption established by this section may be rebutted by the owner of the dwelling or dwelling unit by submitting to the department a sworn written statement by the owner supported by lead-based paint testing or sampling results, a sworn written statement by the person who performed the testing if performed by an employee or agent of the owner, and such other proof as the department may require. . . .

b. The owner of a dwelling or a dwelling unit may apply to the department to have such dwelling or dwelling unit exempted from the presumption contained in subdivision a of this section when either (i) an inspection for lead-based paint in such dwelling or dwelling unit, performed in accordance with section 745.227 of title 40 of the code of federal regulations, or any successor regulation, has determined that there is no lead-based paint present in such dwelling or dwelling unit, or (ii) substantial alterations have been made to such dwelling or dwelling unit and such alterations have resulted in the removal or permanent covering of all lead-based paint in that dwelling or dwelling unit. The department shall by rule determine the requirements needed to qualify for such an exemption. Sections 27-2056.4, 27-2056.8 and 27-2056.9 of this article shall not apply to any dwelling or dwelling unit that has been granted an exemption by the department.

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<sup>2</sup> "Local Law 1" (formerly Administrative Code 27-2013[h]) was replaced, in 1999, with "Local Law 38", which was less stringent. In 2003, the Court of Appeals vacated "Local Law 38" and effectively reinstated "Local Law 1", now set forth in Administrative Code 27-2056, et seq.

Thus, the standards to establish liability for lead paint in a New York building are: (1) the building was constructed prior to 1960; (2) the landlord had actual and/or constructive notice of the presence of a child of six years of age or under; (3) that the defendants failed to take reasonable measures to alleviate lead contamination upon which it had notice; and (4) the lead paint condition complained of was the proximate cause of the claimed poisoning. Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628 (1996); Ortiz ex rel. Ortiz v. Joremi Enterprises, Inc., 22 Misc.3d 1135(A) (N.Y.Sup. 2009). Where triable issues exist regarding defendant's constructive notice of the hazard, or the reasonableness of abatement efforts or causation, summary judgment will be denied. Juarez, supra, at 638.

Generally, for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected. Juarez, supra at 642.

The right of entry, conferred by Local Law 1, gives a landlord constructive notice of any lead paint hazard within an apartment that the landlord knows is occupied by a child of the specified age. Woolfalk v. New York City Housing Authority, 263 A.D.2d 355, 355 (1st Dept. 1999) *citing*, Juarez, supra at 647. Therefore, if a landlord has knowledge that a child under seven resides in the apartment, the landlord may be charged with notice of a lead hazard prior to receiving an order to abate. Juarez, supra at 648. Where, however, a landlord establishes that it exercised due care and was acting reasonably under the circumstances, it will not be held liable for violating Local Law 1. Juarez, supra at 644. "Reasonableness" is based on the landlord's efforts to

\*9] ameliorate or prevent a dangerous lead condition as supported by the regulatory scheme. Juarez, supra at 644.

A. *Sunlil and Milbrook's Motion for Summary Judgment*

Here, it is undisputed that the Building was constructed prior to 1960 and that plaintiff resided in the Apartment when she was under the age of seven. There is also no triable issue of fact on this motion whether Sunlil and Milbrook actually took reasonable steps to abate the condition, because they claim they had no obligation to do so. A fortiori, they took no such steps. Sunlil and Milbrook do not claim lack of notice in their motion for summary judgment. Sunlil and Milbrook's only argument is that they cannot be held liable for plaintiff's injuries because plaintiff did not have an elevated lead level until 2003, which was after Sunlil and Milbrook sold the Building and were no longer owner/manager.

Sunlil and Milbrook do not allege that they "painted, scraped, . . . plastered . . . personally inspected . . . made 'proper arrangements' to correct every problem . . . [or] even initiated tests for the presence of lead" (Ortiz ex rel. Ortiz v. Joremi Enterprises, Inc., 881 N.Y.S.2d 365 [N.Y.Sup., 2009]); rather, Rossi generally asserts that the Apartment was "regularly maintained and was free of peeling paint." Sunlil and Milbrook's "regular maintenance" of the Apartment, which did not include any tests for the presence of lead, and their failure to abate the lead-based paint condition, does not meet the requisite standard of reasonableness. See Miller ex rel. Miller v. 135 Realty Associates, L.P., 266 A.D.2d 112 (1st Dept. 1999). Furthermore, Sunlil and Milbrook ignore the fact that elevated lead paint levels in a child is a condition that develops over

a long period of time, so the fact that plaintiff was not tested until 2003, is not proof that she had no elevated lead levels prior to 2003.

Sunlil and Milbrook, therefore, have failed on this motion to rebut the presumption imposed by NYC Code § 27-2056.5 and have not set forth a *prima facie* case entitling them to summary judgment.

*B. KPV and 507 Realty's Motion for Summary Judgment*

Here, it is undisputed that KPV and 507 Realty purchased the Building after the Apartment was abated. Furthermore, the DOHMH issued a letter following an inspection of the Apartment that took place on July 3, 2003 (26 days prior to the date KPV purchased the Building), stating that "Department of Health records indicate that, based on an inspection conducted on the above date, the violations in the above referenced Commissioner's Order to Abate Nuisance have been corrected." This, coupled with the expert testimony of Coluccio, and the affidavits of Andries, Vorillas, and Ozeri, establish a *prima facie* case that no lead paint hazard existed in the Apartment during the time KPV and 507 Realty owned the Building.

Plaintiff has not set forth any material issues of triable fact to dispute this. Plaintiff provides no evidence or testimony to refute the July 3, 2003 finding of the DOHMH affirmatively stating that there was no lead in the Apartment.

Plaintiff's argument that summary judgment should be denied because the medical and DOHMH records that KPV and 507 Realty provide are not certified or authenticated, and are, therefore, not in admissible form, is also rejected. The medical records are irrelevant to KPV and 507 Realty's motion for summary judgment, as KPV

and 507 Realty are not disputing plaintiff's claims of her medical condition. The DOHMH letter indicating that abatement had been completed, which is relevant, is uncertified. Certification would certainly have made the DOHMH records admissible under CPLR § 4518(c). However, in this motion, what is crucial is the affidavit from DOHMH employee, Andries, who has reviewed DOHMH's files and reaches the conclusion that there has been an abatement of the Apartment. This is probative evidence that an abatement took place and is satisfactory to rebut the presumption in NYC Code § 27-2056.5 and establish a *prima facie* case.

### C. Discovery

Plaintiff further contends that summary judgment should be denied against all defendants, because discovery is still ongoing and depositions have not yet taken place. The issue of discovery is moot as to defendant's Sunlit and Milbrook, because the Court has denied the motion on its merits. As to KPV and 507 Realty's motion, plaintiff has not made the prerequisite showing that it needs discovery in order to properly oppose these motions. The court may consider whether a motion for summary judgment is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. A general belief, however, unsupported by specific details, that further discovery may reveal additional facts to support his case is not a sufficient basis for delaying summary judgment for additional discovery. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st Dept. 2004). Here, no information whatsoever is provided to even suggest that lead paint violations existed after the abatement and DOHMH inspection in

2003. Without such a showing, there is no reason to hold summary judgment in abeyance pending discovery.

*D. Plaintiff's Motion to Extend the Note of Issue*

Since depositions have not yet taken place and there is still remaining discovery between plaintiff, Sunlil, and Milbrook, this case is hereby set for a **compliance conference on March 10, 2011 at 9:30 a.m.**, so that the court can set a discovery schedule and a new Note of Issue date. Plaintiff's motion to extend the Note of Issue is, therefore, granted.

**Conclusion**

Sunlil and Milbrook's motion for summary judgment is hereby denied (Seq. No. 001); KPV and 507's Realty's motion for summary judgment is granted (Seq. No. 002) and plaintiff's motion to extend the time to file the Note of Issue is granted (Seq. No. 003). Prana-BF and ET Management have not moved and, therefore, the court's decision and order makes no finding with respect to any of the claims against either party.

In accordance with the foregoing,

*IT IS HEREBY:*

**ORDERED** that defendant SUNLIL PROPERTIES, SUNLIL PROPERTIES LLC, MILBROOK PROPERTIES LTD., motion for summary judgment (Seq. No. 001) is **DENIED**; and it is further

ORDERED that defendant KPV REALTY LLC and 507 W. 179<sup>TH</sup> REALTY LLC's motion for summary judgment (Seq. No. 002) is GRANTED and the clerk shall enter judgment in favor of defendants, KPV REALTY LLC and 507 W. 179<sup>TH</sup> REALTY LLC, severing and dismissing all claims against them; and it is further

ORDERED that plaintiff's motion to extend the time to file the Note of Issue (Seq. No. 003) is GRANTED on default; and it is further

ORDERED that PRANA-BF PARTNERS and ET MANAGEMENT & REALTY CORP. have not moved and the court's decision and order makes no finding with respect to any of the claims against these defendants; and it is further

ORDERED that a **compliance conference** will be held on **March 10, 2011 at 9:30 a.m.**, at 60 Centre Street, New York, NY, Room 232, at which time the new Note of Issue date will be set; and it is further

ORDERED that any relief not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
January 14, 2011

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

**JAN 19 2011**

NEW YORK  
COUNTY CLERK'S OFFICE