

Dominguez v GIL SMALL REALTY

2011 NY Slip Op 31194(U)

April 13, 2011

Sup Ct, NY County

Docket Number: 402690/5

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 402690/2005

DOMINGUEZ, ENRIQUE

vs.

GIL SMALL REALTY

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

on 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.


FILED

APR 14 2011

NEW YORK COUNTY CLERK'S OFFICE

APR 13 2011

Dated: _____


HON. JUDITH J. GISCHA 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
**ENRIQUE DOMINGUEZ, GARY DOMINGUEZ AND
KAREN DOMINGUEZ, INFANTS BY THEIR MOTHER
AND NATURAL GUARDIAN MARIA DOMINGUEZ AND
MARIA DOMINGUEZ, INDIVIDUALLY,**

Plaintiff (s),

-against-

**GIL SMALL REALTY CORP., AND NEW YORK
CITY HOUSING AUTHORITY,**

Defendant (s).

-----X
NEW YORK CITY HOUSING AUTHORITY,

3rd Party Plaintiff,

-against-

**VANDERVEER ESTATES HOLDING, VE APARTMENTS,
LLC AND PRISTINA REALTY CORP.,**

3rd Party Defendants

-----X

DECISION/ ORDER
Index No.: 402690/-5
Seq. No.: 007

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

T.P. Index No.:
590041/08

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

Papers	Numbered
Gil Small's n/m (3212) w/ LRP JHG affids, JSK affirm, exhs	1
Pltfs' opp w/MJE affirm, MD, JFR, MJE affids, exhs	2
NYCHA opp w/LMB affirm	3
Gil Small's reply to pltfs' opp w/MCB affirm, exhs	4
Gil Small's reply to NYCHA's opp	5

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

GISCHE J.:

This is an action brought on behalf of three infant children by their mother, Maria

Dominguez. It is alleged that the three children sustained lead poisoning while living in the buildings owned by the defendants, Gil Small Realty Corp. and the New York City Housing Authority (respectively "Gil Small" and "NYCHA"). Issue was joined and the note of issue was filed. Gil Small now moves for summary judgment dismissing plaintiffs' complaint. The motion, which is timely (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]), is opposed by plaintiffs and NYCHA.

Arguments

Gil Small is the owner of the building located at 936 Rev. James Polite Avenue, Bronx, New York wherein Maria Dominguez resided with her common law husband and the three infant children who are the subject of this action. According to Gil Small, Ms. Dominguez and her three children occupied apartment 5G without the landlord's knowledge. The principal of Gil Small, Gilberto Brignoni ("Mr. Brignoni"), died after this action was commenced.

In support of this motion for summary judgment, Gil Small relies on sworn affidavits by Luz Raquel Pagan and Gilberto Brignoni, Jr. ("Gilberto Jr.") Ms. Pagan was Mr. Brignoni's longtime companion; she claims to have assisted him with management of the building in 2002, during the period the children are alleged to have lived in apartment 5G. Gilberto Jr. is the adult son of the deceased. Gilberto Jr. claims he helped his father with the building from October 2005 through the time of his death in 2006. According to the son, Ms. Pagan, who he calls his step mother, actively helped manage the building for his father. He claims she was in charge of record keeping, as well as rent collection.

Gil Small argues that this case should be dismissed because the Dominguez

family did not move into apartment 5G until June 25, 2002 and at least one child (Enrique) showed elevated blood-lead levels ("BLL") before that date (29 ug/gl) on June 11, 2002.

Although Gil Small does not deny that excessive levels of lead paint were found in apartment 5G on July 17, 2002, when the apartment was tested by an inspector from the Department of Health, Gil Small denies that it had actual and/or constructive notice that children under the age of six were living in that apartment. According to the landlord, the tenant of record (Feliciano Ramirez) was living in the apartment until June 2002, when he moved out. Gil Small further alleges that once it was notified of the dangerous condition, it immediately relocated the Dominguez family to another apartment in the building, even though they were not tenants with any rights, and that it then abated the lead condition in apartment 5G.

Gil Small denies that the lead paint condition complained of in apartment 5G was the proximate cause of the claimed poisoning, focusing on the relatively low BLL that Gary had while he lived in the apartment (9 ug/dl). According to Gil Small, the claims based upon that child's alleged lead poisoning must be dismissed as inactionable, as a matter of law, because the New York City Health Code provides that "lead poisoning [is] to be defined as a blood-lead level of 10 micrograms per deciliter or higher ..." (24 Rules of the City of New York § 11.3) ("RCNY").

Gil Small provides the sworn affidavit of its expert, Joseph H. Guth, PhD ("Dr. Guth) who is an industrial hygienist. Dr. Guth opines that the children's elevated blood levels are not causally related to conditions in apartment 5G, but due to Ms. Dominguez's habits while pregnant and/or the use of lead containing products. He

opines that Ms. Dominguez, who is from Mexico, may have eaten contaminated dirt while pregnant, passing lead to the children in that manner. He also opines that she may have used contaminated food products, like a popular sauce called "mole" to cook for the children or allowed one or more of the children to play with her cosmetics (eyeliner) which may have contained lead. Dr. Guth concludes that Karen, the youngest of the three children, could not have ingested paint chips because she was only 4 months old when she lived in apartment 5G and was physically unable to do so.

Gil Small urges the court to dismiss the plaintiff/mother's individual claims because she has never presented any proof of her loss of services claims, although she has asserted a cause of action on her own behalf.

In opposition to Gil Small's motion, plaintiff first argues that most of what Gil Small submits in support of its motion is not evidence in admissible form, including the lease showing that the Dominguez family was not the tenant of record for apartment 5G or various hospital records, none of which are authenticated. Plaintiff states that the lease cannot be authenticated because Mr. Brignoni is deceased and the tenant of record whose name appears on the lease cannot be located. Plaintiff argues – as does NYCHA– that other documents are mere tables of information or compilations that are attorney work product (prepared by Gil Small's attorneys) and, therefore, inadmissible as well.

Going to the merits of Gil Small's motion for summary judgment, plaintiff and NYCHA each argue that there are many material issues of fact in dispute which preclude the grant of summary judgment. They contend it is disputed exactly when Ms. Dominguez moved into apartment 5G with her family, yet Gil Small insists it was "June

25, 2002" without any credible evidence pointing to that date.

Law Applicable to a Motion 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 [1st Dept 2003]).

Discussion

Although plaintiff and NYCHA correctly raise a number of procedural arguments about why some of the submissions by Gil Small in support of its motion may not be in admissible form, Gil Small's motion must be denied for far more fundamental and basic reasons.

Pursuant to New York City Administrative Code § 27-2056 ("Local Law 1")¹ there is a rebuttable presumption that in any unit within a multiple dwelling erected prior to 1960 in which a child six years of age or under resides, any peeling paint or similar

¹ Local Law 1 was repealed by the enactment of Administrative Code of the City of New York § 27-2056 et seq. (hereinafter Local Law 38), effective November 12, 1999. However, Local Law 38 was deemed null and void by the Court of Appeals in Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337 [2003]. Consequently, Local Law 1 was "revived" (see, O'Neal v. New York City Housing Authority, 4 A.D.3d 348 [2nd Dept. 2004]).

surface-coating material contains more than a legally-allowable level of lead (Juarez v. Wavecrest Management Team, 88 N.Y.2d 628 [1996]). Thus, the standards to establish liability for lead paint in a New York building are that: (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 v. Wavecrest Management Team, *supra*).

Gil Small does not deny the building was built before 1960 and plaintiffs have not directly challenged the landlord's contention that, beginning on July 17, 2002, it took reasonable steps to alleviate the dangerous level of lead in apartment 5G, nor contend that the landlord delayed in moving the family. To the contrary, Gil Small was actually notified of the lead condition July 17, 2002 and the Dominguez family was relocated to another apartment by August 6, 2002. The parties, however, sharply dispute whether Gil Small had actual and/or constructive notice of the presence of a child age 6 or under before July 17, 2002 and whether the lead paint condition complained of was the proximate cause of the children's elevated BLL. There is also a dispute, at least as to one child, whether he, in fact, suffered an actionable injury.

According to Gil Small, it had no notice that the Dominguez family was living in apartment 5G, let alone that they had three children under the age of 6², because the landlord did not accept rent from the Dominguez family and their name was not on the

²The children were ages 5 (Gary) 2.5 (Enrique) and 4-5 months old (Karen) at the time they lived in apartment 5G.

mailbox. While those statements are not directly challenged by plaintiffs, Ms. Dominguez says her occupancy was open and obvious and that she did not hide herself or the children. She states that she rented a room in apartment 5G from a woman named "Catalina Quintanilla," who she says was the wife of Feliciano Ramirez, the tenant of record. According to Ms. Dominguez, she lived in the apartment from May 2002 until the landlord moved her to another apartment in the building. Ms. Dominguez has stated that someone, who she believes could have been Mr. Brignoni, personally came by to collect rent from Ms. Quintanilla each month (which she paid in cash) and that on those occasions the man who was either Mr. Brignoni or his agent observed her and the children in the apartment. Issues of credibility are for the trier of fact to decide and there is a material issue of fact whether the landlord (personally, or through his agent) knew or should have known of the presence of small children in the subject apartment.

Gil Small claims that the Dominguez family moved into apartment 5G on June 25, 2002, because that is at or about the time that the tenant of record, Feliciano Ramirez, moved out. The timing is important because by May 2002, Enrique already had an elevated BLL of 29 ug/dl. Gil Small's assertion of when the Dominguez family moved in has no factual predicate in the record developed on this motion. At her deposition, Ms. Dominguez was asked a number of questions about where she lived shortly after she and her family moved out of their New Jersey home. Ms. Dominguez described an itinerant life, moving from place to place, after just a month or two or even weeks. Although she was asked when she moved out of the Gil Small building, she was never directly asked the date when she moved into apartment 5G. Ms. Dominguez

provides her sworn affidavit that she believes she moved into apartment 5G in May 2002, which is similar to the statement she made in connection with her application for City housing, after she moved out of the Gil Small building. In that application she states that she resided at 936 Rev. James Polite Avenue from May 2002 through October 2002. Since this is a material factual dispute, it is for trier of fact to decide when Ms. Dominguez actually moved into apartment 5G. Therefore, Gil Small has failed to prove that Ms. Dominguez moved into the apartment only after May 2002.

Gil Small primarily relies on the affidavit of its expert for its argument that the children's elevated BLL is not causally related to the lead paint in the apartment. The expert's opinion, however, does not establish a prima facie case on this issue entitling Gil Small to summary judgment.

Without deciding whether Dr. Guth is qualified as an expert on lead poisoning, his report is based entirely on speculation and has no basis in fact. At her deposition, Ms. Dominguez was asked whether she had experience any unusual cravings while she was pregnant, such as for "dirt," or had cooked for the children using mole sauce. She responded that she had not eaten dirt, but craved pizza and strawberries. While acknowledging that her mother in law had sent her certain delicacies from Mexico, like mole sauce, she said she stopped getting them because she had found out that "she shouldn't eat that food." She also testified that sometimes she also got presents from Mexico of cosmetics. Although the report by the Department of Health indicated that the inspector had, in fact, observed a container of mole sauce in the house and eyeliner with the word "kohl" stamped on it, there is no evidence that either product was tested for, or in fact contaminated with lead, or even that either product was imported from

Mexico. Consequently, Dr. Guth's opinion, that these are possible sources of the children's lead exposure is entirely speculative and without any basis in fact. In any event, even if those products were used and did have lead, the testing conducted by the Department of Health revealed that there was also lead paint in apartment 5G. Although Ms. Dominguez's attorney purchased some lead strips and did some testing of his own and opines that "kohl" eyeliner can simply mean a color, but not a dangerous lead containing product, these informal tests and statements are not evidence in admissible form. They have not been taken into consideration by the court in deciding this issue in plaintiffs' favor.

Gil Small's additional argument, that a blood lead level of less than 10ug/dl is, as a matter of law, not actionable, has been the subject of decisions by various appellate and trial courts in the First and Second departments. In the Appellate Division, First Department case of Santiago v. New York City Board of Health (8 AD3d 179 [1st Dept 2004]), the court affirmed the motion court's dismissal of plaintiff's case where there was "no reliable evidence" that the plaintiff ever had a blood level above 3ug/dl. None of the children in that case, however, had been tested for lead. In Arce v. New York City Housing Authority (265 AD2d 281 [2nd Dept 1999]), the Appellate Division, Second Department dismissed the complaint, based upon the insufficiency of plaintiff's evidence of elevated blood lead levels over 3 ug/dl.

At the trial level, some courts have held that a triable issue fact exists as to whether the infant plaintiff was injured as a result of his or her exposure to lead, notwithstanding that his or her BLL was below 10 ug/dl (Singer v. Morris Avenue Equities, 27 Misc3d 311 [Sup Ct Bronx Co 2010]; Rhys v. Rossi, 2009 NY Slip Op

32056 [U], 2009 WL 2980510 [Sup Ct. Queens Co. 2009]; Peri v. City of New York, 8 Misc3d 369 [Sup Ct. Bronx 2005]). In Cunningham v. Spitz, 218 AD2d 639 [2nd Dept 1995], the Appellate Division, Second Department held that “notwithstanding the fact that [plaintiff’s] blood-lead level did not fall within scientifically accepted definitions of lead poisoning...” plaintiff had raised triable issues of fact as to whether the plaintiff was injured as a result of his exposure to lead.

The decisions by these courts are consistent with the purpose of Local Law 1, which is to protect a particularly vulnerable class of persons (children age 6 and under). The law does not, however, impose absolute liability without regard to fault. Furthermore, violations of local ordinances or administrative rules may constitute evidence of negligence, but not negligence per se (see, Elliot v. City of New York, 95 N.Y.2d 730 [2001]; Vega v. Molina, 240 A.D.2d 399 [2nd Dept 1997]; Barnes v. Stone-Quinn, 195 A.D.2d 12 [4th Dept. 1993]; Permuy v. City of New York, 156 A.D.2d 174 [1st Dept. 1989]). Consequently, just as not every situation where a child has an elevated BLL of greater than or equal to 10 ug/dl will result in the imposition of liability on the landlord (Bygrave v. New York City Housing Authority, 65 AD3d 842 [1st Dept 2009]), a reasonable jury could find that although one child’s blood-lead level was only 9 (just shy of the CDC’s definition of lead poisoning), the child was injured as a result of exposure to lead. Thus, there is a triable issue of fact whether the lead paint condition complained of was the proximate cause of the children’s injuries, including the child with the lowest BLL.

Gil Small’s argument, that Ms. Dominguez has failed to provide any evidence of her own damages, ignores its own burden on this motion which is to prove Ms.

Dominguez has no claim for loss of her children's services. This record, however, amply supports her claim as there are reports that the children have IQ's in the 70's and 80's, they need professional help and would thrive in small, intimate schools which cost money that this struggling family simply cannot afford. This branch of the landlord's motion for summary judgment is denied as well.

Conclusion

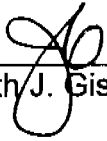
Gil Small's motion for summary judgment is denied in its entirety. This case is ready to be tried since the note of issue was filed and court mandated mediation has been unsuccessful. The court directs that plaintiff serve a copy of this decision and order on the mediator assigned to this case, as well as on the Office of Trial Support so the case can be scheduled for trial after the next, and final, mediation session.

Any relief requested that has not been addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
 April 13, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

APR 14 2011

NEW YORK
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