Rivera v Neighborhood Partnership
2013 NY Slip Op 33647(U)
June 26, 2013
Sup Ct, Bronx County
Docket Number: 8176/06
Judge: Mark Friedlander
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

CLARA MILENA RIVERA, et al.

Plaintiffs,

-against-

NEIGHBORHOOD PARTNERSHIP, et al.

Defendants.

DECISION/ORDER
Index No. 8176/06

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 4 read on this motion on the calendar of December 12, 2012

Papers Numbered

Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed.....1-2.....
Answering Affidavits and Exhibits Annexed.....3.....
Replying Affidavits and Exhibits Annexed.....4.....

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

Dated: 6/24/13

MARK FRIEDLANDER, J.S.C.

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NEW YORK SUPREME COURT - COUNTY OF BRONX
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Plaintiffs,

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Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 8176/06

HON. MARK FRIEDLANDER:

Defendants Robert A. Dvorak ("RAD") and Diane L. Dvorak ("DLD") move for summary judgment dismissing all of plaintiff's claims against them, as well as all cross-claims asserted against them. Plaintiff, an infant bringing the action through her mother and natural guardian, maintains that she suffered injury as a result of lead poisoning in a house located at 18 William Street, in Babylon, New York, from her birth in September 2003 until mid-2005, and that defendants RAD and DLD, as owners of the house, bore responsibility for such injury.

The other four defendants in the caption owned or managed a premises in which plaintiff resided after November 2004. Those defendants brought two separate summary judgment motions which were recently granted by the Court, dismissing the claims against them. Because the instant motion involves a different premises and raises distinct issues, it is being addressed separately in the Decision which follows.

For the reasons set forth hereinafter the motion is denied as to RAD, but granted as to DLD.

Plaintiff was born on September 18, 2003, and resided thereafter with her parents (and twin brother) in the home of her maternal grandmother, on William Street in Babylon, Suffolk County, New York. In September 2004, the family departed Babylon, and stayed for approximately one month in an apartment at 700 Morris Avenue, Bronx, New York, the home of the infant's paternal grandparents. As of November 2004, the

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family resided at a renovated apartment on Clay Avenue in Bronx, New York.

On June 18, 2005, the infant plaintiff had her first lead-level blood test, and was found to have the significantly elevated blood level of 37 micrograms per deciliter. In accordance with established protocol, the residences which the infant had occupied, both at Clay Avenue, Bronx, and at William Street in Babylon, were inspected for lead contamination by the respective governmental authorities.

Although the infant ceased full time residence in Babylon house ("the premises") at some point in September 2004, she continued to visit her grandmother at the premises several times a month, and slept over on weekends (and sometimes, according to the mother's deposition testimony, for longer periods). The visits continued throughout the remainder of 2004, and most of 2005. The infant's mother has testified that the premises had peeling paint on window sills and ceilings.

Plaintiff's complaint asserts that the lead poisoning suffered by the infant plaintiff occurred at both the premises and at Clay Avenue in the Bronx. RAD and DLD were named in their capacities as owners of the premises. Although the answer of movants denies ownership of the premises, such ownership is accepted for the purposes of this motion, based on the deposition testimony of movants, their failure to raise the issue of ownership in the instant motion, and the copy of the deed appended as an exhibit to plaintiff's opposition papers, which remains un-refuted in movants' reply.

Movants seek dismissal of the claims against them premised on the fact that the Suffolk County Department of Health Services never issued an order to abate the lead in the premises, and never notified movants of the presence of any lead there. They further argue that they never had any actual or constructive notice that the premises contained lead, or that there was a child living at the premises. It should be noted that the claim against movants, arising as it does in a county outside of New York City, does not fall under Local Law 1, which provides a distinct basis for proving notice. The claims against the other (now dismissed) defendants, arising in Bronx County, were controlled by such law. Here, however, notice is more difficult to

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establish.

While movants stress that the records from Suffolk County prove the lack of any issuance of a notice to abate, it is not clear why this proof should be of particular benefit to defendants. First, there can be no doubt that the Suffolk County inspectors found lead at the premises. The records of inspection attached as exhibits to the submissions of both sides show quite clearly that several surfaces in the premises tested positive for lead contamination. Thus, that there was lead at a location in which the infant had resided cannot be gainsaid. No reason is offered by either side for the failure of the county to communicate with the property owner or to order abatement. The fact that the infant had already moved from the premises, and that there were only older persons in residence at the time of the inspection, may have caused the lack of follow-up, but this cannot be known for certain based on these submissions.

Second, even if there had been a communication or an abate order sent to these property owners, such notice would have arrived only after the inspection of July 8, 2005. The vast majority of the time that the infant is claimed to have suffered lead poisoning at the premises occurred during her full time residence from September 2003 to September 2004, and her visits thereafter through late 2005. During all of that time, up to July 2005, there could not have been any notice at all from county authorities, because they had not yet inspected the premises. Thus, plaintiff's claims here are undoubtedly based on a claimed notice which has no relationship with what the county did or did not do. Under the circumstances, if both the existence of the lead in the premises, and the claimed notice to defendants, are asserted without regard to whether the Suffolk authorities followed up on their inspection, such follow-up is not a part of plaintiff's claim, and her claim must rise or fall, without it. Consequently, it is an irrelevancy.

What then is the basis for a claim of notice to defendants, and how can the remaining prongs of the motion be answered by plaintiff? Those prongs, generally questioning the existence of actual or constructive notice, are, in fact, addressed in the opposition papers with quotes from the deposition testimony of defendants

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and with an affidavit from the infant's mother. As prelude to both, though, the opposition papers discuss, as did the movants, the seminal decision of the Court of Appeals in Chapman v. Silber, 97 N.Y.2d 9 (2001).

In Chapman, Judge Ciparick, speaking for a unanimous court (one judge did not participate), declared that, in counties outside of New York City, a claim of lead poisoning against a landlord can survive (i.e. a triable issue of fact is raised) when a plaintiff shows the following five factors regarding such landlord: 1) He retained a right to enter the premises and assumed a duty to make repairs; 2) he knew that the apartment was constructed at a time before lead-based interior paint was banned; 3) he was aware that paint was peeling on the premises; 4) he knew of the hazards of lead-based paint to young children; and 5) he knew that a young child lived in the apartment.

The above burden on the landlord does not go as far as New York City's Local Law 1, but it definitely carves out a greater sphere of responsibility for landlords. Judge Ciparick and the other court members were clearly aware of that, as the decision discusses quite openly, acknowledging that "Absent explicit legislative authorization we should not hastily impose a new duty" but then concluding "The absence of a statutory scheme is not fatal to this type of action." (at page 20). The court further acknowledged that the previously applied test permitted landlords to claim lack of notice unless they were actually aware that lead was present, but, as Judge Ciparick noted, because lead is undetectable to the senses, only testing could provide the awareness which would trigger "notice," and, thus "landlords who deliberately refrained from testing for lead can shield themselves from liability." (Pp. 20-21).

With the issuance of the 2001 decision in Chapman, the new statewide rule was, therefore, that a claim of lead poisoning did not require proof of actual or constructive notice to the landlord that there was lead in the dwelling. Rather such notice could be imputed so long as the five aforementioned factors were present. Movants claim that plaintiff cannot prove the existence of all of those factors, or even any one of them.

However, in their opposition papers, plaintiff effectively raises factual issues indicating the possible presence of all of the five. While defendants may dispute this proof, the outcome is for a jury to decide.

First, plaintiff, both in the deposition testimony of the mother, and in her affidavit, goes into great detail as to RAD's possession of a key to the apartment, his frequent personal involvement in repairs to the premises, his entry into the premises on many occasions, including when he let himself in, and his passing by, and witnessing, the paint conditions in the premises. All evidence as to the rights and duties of RAD must be gleaned from testimony as to his practices, because the infant's family never had a written lease, despite residing in the premises since the mid-90's. There is little doubt, though, that the statements of the infant's mother satisfy the first of the enumerated factors.

Second, the deposition of RAD established that he was aware of the age of the premises. He testified that he had lived there as a child in the early fifties (when it was owned by his grandparents) and he suggested that it dated from at least the forties. In fact, the Suffolk County records show it to be a 1930 structure, but even taking into account only what RAD claimed to know, it is clear that he knew the premises to date from a period well before 1960, when lead paint was banned.

Third, the infant's mother stated in her affidavit that RAD had been told, in her presence, of the peeling of paint in the premises. While RAD acknowledges the receipt of complaints from the infant's family about various problems, he denies ever hearing specifically about paint chipping in the premises. Nevertheless, the assertions of the infant's mother are sufficiently specific and clear to set up an issue of fact which must be decided at trial.

When an issue of fact emerges primarily from the language of an affidavit submitted in opposition to a summary judgment motion, the Court's antennae are instantly attuned to the possibility that such language has been tailored to defeat the motion and raises only a "feigned issue of fact," in the common parlance of countless decisions. However, on balance, the Court finds that the affidavit submitted here does not suffer from that

infirmity. In the first instance, although the opposition papers do not quote from the deposition of the infant's mother, that massive tome (355 pages) contains nothing which would contradict the assertions in the mother's affidavit. Contradicting earlier deposition testimony is, and has been consistently, the main test for identifying a newly created feigned issue of fact, and the affidavit submitted here passes that test.

At her deposition, the infant's mother was asked what her own mother requested of the landlord and, among the items she listed was the request to RAD "to paint." (Page 87, line 24). She later re-iterated "complaints about the paint" to RAD (page 109, line 7). While these responses did not specify paint "chips," there was a question posed to the infant's mother by one of the counsel for defendants which specifically pre-supposed complaints to the landlord about paint chips, and the witness responded in the affirmative, implicitly confirming such specific complaints. (Page 112, lines 19-23). The only time the witness denied making complaints to RAD about painting was in relation to the time period after the lead inspection of the premises (pp. 195-198), but, as was set forth supra, the period prior to the inspection is the main time span at issue here.

Because the deposition testimony may implicitly support what is set forth in the affidavit of the infant's mother, but certainly does not contradict it, it is here accepted as not tailored merely to defeat summary judgment, but rather as properly setting up an issue of fact. In any event, movants, who had a chance to contest the affidavit in their reply, failed to advance the contention that it presented a feigned issue of fact, and thus have forfeited the opportunity to raise the issue.

Fourth, at his deposition, RAD conceded that he was aware of the danger of lead-based paint to young children, acknowledging that he had heard such information from the media. It is normally most difficult to prove what another party knew or did not know about a general issue, but, in this case, RAD was sufficiently forthcoming to satisfy the fourth prong of the test in Chapman. RAD was vague about when he had learned of the danger of lead, but he acknowledged knowing about it at the time he owned another property in Brentwood, Long Island. In a separate response, he stated that he owned that latter house in the 1990's and sold it around

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2001. This would mean that he was aware of the dangers of lead by at least 2001, years prior to the time that the infant plaintiff resided in the premises. In general, though, RAD acknowledged being owner, at various times, of so many houses as to raise the possibility that this type of knowledge, critical to home ownership and to the renting out of properties, could be imputed to him even without direct proof, but, in view of his testimony, it is not necessary to reach such conclusion with regard to RAD.

Finally, according to plaintiff, RAD had to be aware that children were residing at the premises. While RAD denies such knowledge, it is the testimony of the infant's mother, both at her deposition and in her more recent affidavit, that RAD was fully aware of the infant's being at the house. She has testified that he observed her at the premises at the time she was visibly pregnant with the infant plaintiff, thus attributing to RAD knowledge of the impending arrival from the very beginning of its life. She testified that, in repairing the premises, he passed by the all of the child's toys, so that he could not have missed the signs of a child in residence. The affidavit (paragraphs 6 through 10) is so replete with instances of claimed observation of the children by RAD that it would be wasteful to repeat more of them here. At the very least, therefore, there is an issue of fact as to whether the final factor is satisfied.

Because of the foregoing, all of the factors required to be met by the Court of Appeals in its Chapman decision, have been met, either by virtue of acknowledgment by RAD, or because plaintiff's assertions set up a triable issue of fact with regard to such factors.

It should be noted in passing that plaintiff's opposition papers initially include a totally incomprehensible contention that the motion must fail because movants did not address all of the five factors set forth in the Chapman decision. Leaving aside whether movants did or did not address all five, the fact remains that the Court of Appeals predicated liability on the presence of all five factors, not on any of them alone, or even any smaller combination of them. Thus, if even one factor cannot be proved, that failure of proof precludes liability. Did plaintiff's counsel not realize that the factors were set forth in the conjunctive, and not

in the alternative? In the end, though, the plaintiff's proof was found here to sufficiently address all five factors, so that plaintiff's initial argument need not determine the result.

Proving that inexplicable arguments can infect the submissions of either side, movants, in their reply, present the bizarre contention that certain precedent, set forth before Chapman was decided, which contradicts the result in Chapman, can still control and should be followed by this Court. They cite Appellate Division decisions issued between 1991 and 1998, asserting that landlords cannot be held to have notice of a lead condition merely because they knew of chipping paint; but rather that such landlords had to have notice of the actual presence of lead in order to be found liable. This argument flies in the face of common sense, as much as the common law, as we know it. When a higher court changes the rule which was previously applied by lower courts, those previous decisions are effectively overruled, whether or not defendants wish to acknowledge it, and whether or not the higher court specifically says so. Movants will hopefully understand if this Court feels bound to follow the rule set forth by the Court of Appeals in 2001, rather any contrary rule set forth by the Second and Fourth Departments years earlier.

Most glaringly, all of the proofs provided by plaintiff as to the factors satisfied in holding RAD liable apply only to RAD and not to DLD. There is no proof adduced, or argument presented, that DLD ever entered the premises to make repairs, or was aware that paint was peeling, or knew that children were in the premises. No testimony is cited to show that DLD knew of the precise age of the house (it was in RAD's family, but DLD was and is RAD's spouse), or knew about the dangers of lead. If RAD was the one who managed the properties, then it is reasonable to assume, in the absence of specific proof to the contrary, that DLD could have remained unaware of the dangers posed by lead. Given the proof adduced in these motion papers, it cannot be said that a prima facie case of any type has been made out against DLD.

For all of the above reasons, the motion is granted as to DLD, and denied as to RAD. Plaintiff's claims

against DLD, and only DLD, are dismissed. Such portion of the motion as sought dismissal of cross-claims is denied as moot, in view of the dismissal of plaintiff's claims against the remaining co-defendants.

This constitutes the Decision and Order of the Court.

Dated: 6/26/13

MARK FRIEDLANDER, J.S.C.