Lewis v Riverside 676, LLC
2014 NY Slip Op 33992(U)
October 9, 2014
Supreme Court, New York County
Docket Number: 114014/11
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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TERRENCE BRETT ZACHARY LEWIS, an infant by his mother and natural guardian, ADRIENNE LEWIS,

Plaintiff,

-against-

RIVERSIDE 676, LLC,

Defendant.

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Index № 114014/11

Motion Seq. No.: 002

DORIS LING-COHAN, J.:

In this lead poisoning action, defendant Riverside 676, LLC (Riverside), the owner of the building in which the infant plaintiff and his mother were tenants, moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint in its entirety, or in the alternative, for an order restricting plaintiff's lead poisoning claims to the period following January 11, 2008. Plaintiff opposes both aspects of the motion.

Plaintiff Adrienne Lewis brings this action on behalf of her son Terrence Brett Zachary Lewis ("infant plaintiff" or "Zachary,") who allegedly sustained serious injuries as a result of his ingestion of lead-based paint, while residing in apartment 3D, at 676 Riverside Avenue, in upper Manhattan (the building) since his birth on March 9, 2007. For the purpose of the motion, it is undisputed that the building was built prior to 1960 (in or about 1911), when lead-based paint was commonly used in New York City buildings, and that the infant plaintiff has continuously lived in apartment 3D, with his mother and grandmother Linda Lewis, the tenant of record.

New York City's Local Law 1, the applicable regulatory scheme codified in Administrative Code of the City of New York § 27–2056.5, provides, at subsection (a), in

relevant part:

> "[i]n 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 . . . ."

Due to New York's concern for the hazards to young children posed by their exposure to lead-based paint, a multiple dwelling owner is obligated, under Administrative Code § 27-2056.3, to "expeditiously remediate such condition" when it has actual or constructive notice that a child of applicable age, defined as "under seven years of age" (*see* Admin. Code § 27-2056.18), is living in one of its dwelling units. Any failure to properly do so within a reasonable period of time, subjects the owner to liability for injuries caused by the child's exposure to lead (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 647 [1996]).

In seeking summary judgment, defendant argues that infant plaintiff's injuries may have stemmed from causes other than lead paint and, in support, defendant submits a copy of the independent medical examination (IME) report prepared by the chief of child neurology at New York Presbyterian Hospital. (defendant's exhibit H). Nevertheless, the central issue before the court is notice. Specifically, whether Riverside had actual or constructive notice, prior to January 11, 2008, that the infant plaintiff was living in the building, a prerequisite for liability.

Zachary's elevated blood lead level was first detected by his pediatrician, Dr. Jessica Jersack, during his first birthday check-up on or about March 17, 2008. As required, Dr. Jersack, notified the New York City Department of Health and Mental Hygiene (DOH) that Zachary had an elevated blood lead level (BLL) of 32 µg/dL, as of March 17, 2008. BLLs are calculated in units of micrograms (µg) per deciliter (dL), with persistent blood levels recorded as (equal to or

greater than)≥10 µg/dL, as indicative of "elevated lead levels" due to on-going lead exposure (*see Vega v SSA Props., Inc.*, 13 AD3d 298, 299 n 1 [1st Dept 2004]; 28 RCNY § 11.03; Public Health Law 1370 [6]). Accordingly, when Zachary's initial BLL was found to be significantly greater than 10 µg/dL, Dr. Jersack became concerned.

Zachary's BLLs for the year following his birth were recorded as: 32 µg/dL on March 17, 2008; 38 µg/dL on March 19, 2008; 21 µg/dL on April 28, 2008; 18 µg/dL on June 6, 2008; and 13 µg/dL on September 25, 2008, all of which exceed 10 µg/dL (*see* bill of particulars, ¶ 10). According to Adrienne Lewis, as a result of his exposure to lead, her son, who was a healthy baby at birth (with apgar scores of 9 and 9), has sustained developmental delays and has been diagnosed with mild pervasive developmental disorder, commonly referred to as either "PDD" or autism.

It is undisputed that, following Dr. Jersack's reporting of Zachary's elevated BLL to DOH, two DOH investigators appeared at plaintiff's apartment on March 20, 2008, to conduct an initial field visit and inquiry into the source of Zachary's exposure to lead. Although the actual lead inspection of the apartment needed to be rescheduled to March 27, 2008, the inspectors did have an opportunity during the initial visit, to speak with Adrienne Lewis and her mother about "sources, pathways, and [the] effects of lead poisoning," and, among other things, to advise them to wash all surfaces, as well Zachary's hands and toys, on a frequent basis, and to bring him to the doctor for blood-lead-level monitoring and for dietary advice. The inspectors also offered, and Adrienne Lewis accepted, the "Early Intervention" program on the infant plaintiff's behalf and told them that, if lead-based paint and/or dust is found in the apartment, that the child would need to be removed from the premises while abatement work is performed (defendant's exhibit

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DOH inspectors returned on March 27, 2008, and tested the apartment's surfaces. Lead paint was found in each room, with some 113 of the 164 areas checked testing positive for unsafe levels of lead. Mold was also discovered in parts of the apartment. These findings resulted in the issuance of DOH violations to the landlord. The apartment was then inspected by HPD, which, like DOH, found lead throughout the apartment and issued violations to the landlord. The landlord was ordered to abate the apartment, and in mid to late April 2008, the infant plaintiff and his mother and grandmother were relocated to a Lead Safe House, where they remained until the apartment was deemed lead-free and safe, on or about July 28, 2008.[1]

Plaintiffs commenced this action for damages alleging that Riverside with negligent and violated Title X of the Housing & Community Development Act of 1992, under 42 USC § 4851, et seq. (Title X). Plaintiff' claims that Riverside: had actual and/or constructive notice that a child under the age of seven was living in the apartment, had knowledge that the subject premises contained peeling and chipping paint which, due to the age of the building, likely contained lead, failed to warn plaintiff of this hazardous condition and failed to take proper precautions, as required by statute, code and case law, to prevent the child from lead-based injury. Plaintiff also asks the court to award punitive damages to both punish Riverside and to deter others from similar conduct. After issue was joined, discovery was completed, and the note of issue was filed, Riverside served the instant motion for a summary dismissal of the complaint in its entirety, or in the alternative, for an order restricting plaintiff's causes or action to the period

[1] The BLLs recorded after Zachary's second birthday (post remediation) were: 9 µg/dL on April 14, 2009; 8 µg/dL on April 27, 2009; 6 µg/dL on July 27, 2009; 4 µg/dL on October 28, 2009; and 5 µg/dL on January 18, 2010, showing a steady decline in BLLs.

following January 11, 2008. For the sake of brevity, the year between Zachary's birth on March 9, 2007, and the time of his first birthday check up on March 17, 2008, when the pediatrician discovered that he had an elevated BLL, will be referred to as the "First Year" throughout the balance of this decision.

It is well settled that, to obtain summary judgment, Riverside 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 NY2d 851, 853 [1985] [internal citation omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Should Riverside make the requisite showing, the burden would shift to plaintiff to come forward with evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (*id.*).

It is Riverside's position that it cannot be held liable for any injuries sustained by Zachary because: (1) it had no affirmative duty to inquire as to the presence of a child under seven years of age in L. Lewis's apartment; (2) the "Annual Notice to Tenant or Occupant in Buildings with 3 or More Apartments" form (Annual Notice), required under Local Law 1 of 2004, which was filled out by L. Lewis on January 10, 2007, indicates that there was no child under the age of seven years old living in apartment 3D; (3) neither Linda Lewis, nor Adrienne Lewis advised Riverside, at any time during the First Year, of Zachary's birth and presence in their apartment; (4) the Annual Notice filled out by Linda Lewis on January 11, 2008, indicates that a child of applicable age was now residing in apartment 3D, and requests the installation of window guards; (5) upon receipt of the Annual Notice for 2008, Riverside, through its property manager

nonparty Newcastle Realty Services, LLC (Newcastle), promptly reached out to L. Lewis for access to the apartment, but was delayed in its efforts by Linda Lewis and/or Adrienne Lewis's failure to respond to any of the three letters sent to them, or to any of the telephone calls reportedly made by one of its agents.

Among the proof submitted in support of the motion are the deposition transcripts of Adrienne Lewis and her mother Linda Lewis. During questioning, Linda Lewis conceded that she did not inform building management or the building super of Zachary's birth or residency because she "[didn't] think that's his business" (Linda Lewis tr at 86, 87). She also acknowledged that she did not complain to the super or to building management about paint conditions in her apartment, or recall asking the landlord to do any work in her apartment during the First Year (*id.* at 27, 41). Adrienne Lewis also acknowledged that she did not notify anyone connected with the building of Zachary's presence, and was, similarly, unable to recall making any complaints to the super, or (personally) contacting the property management office about paint issues during the First Year (Adrienne Lewis tr at 111-113). Riverside also submits the deposition transcripts of Adam Fischer (Fischer) and Dionne Christopher (Christopher), individuals who either currently (Fischer) or previously (Christopher) worked for Newcastle, as further evidence that Riverside, even through Newcastle's agents, did not have knowledge of Zachary's tenancy during the First Year.

Defendant also offers documentary evidence in support of its motion. In addition to the neurologic IME report, defendant's submissions include: the apartment lease signed by L. Lewis in 1981; the Annual Notice forms filled out by Linda Lewis on January 10, 2007, and January 11, 2008; three identical letters addressed to Linda Lewis from Christopher on behalf of Newcastle,

dated January 10, 2008, January 11, 2008, and February 8, 2008, respectively, requesting access to the apartment in order to install window guards; DOH inspection records for apartment 3D; the DOH Order to Abate dated April 3, 2008; the Notification of Commencement of Lead Abatement letter dated April 17, 2008; and violations issued by DOH to Riverside with respect to apartment 3D.

Riverside contends that the oral and documentary evidence, specifically, the Annual Notices, conclusively establish that it had no notice, prior to January 11, 2008, that a child of appropriate age was living in apartment 3D. Riverside also points out that "Local Law 1 [does not] require landlords to affirmatively . . . ascertain whether children six years of age or under reside in their buildings" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d at 646). Therefore, inasmuch as it did not receive the requisite notice, Riverside cannot be subject to the presumption that peeling, lead-based paint was present in the apartment (*see* Administrative Code §§ 27-2056.4.4 [d][2], 27-2056.5), or be held liable for the infant plaintiff's injuries.

Riverside also argues that plaintiff may not rely on constructive notice to avoid her obligation to provide actual notice of the infant plaintiff's residence in apartment 3D (citing Administrative Code § 27-2056.4). Alternatively, it argues that plaintiff's attempts at constructive notice are inadequate.

Relying upon *Worthy v New York City Hous. Auth.* (18 AD3d 352 [1st Dept 2005]) and *Barker v 155 E. 51st St., LLC* (18 Misc 3d 1110[A], 2007 NY Slip Op 52486[U] [Sup Ct, Kings County 2007]), Riverside argues that plaintiffs cannot use constructive notice to satisfy the notice requirement. In such cases, the motion courts found that each of the plaintiffs' insistence that their building's employees must have observed their infant plaintiff children in their

respective buildings (but failed to take appropriate action), were speculative, conclusory, vague, and inadequate to constitute constructive notice. Riverside insists that plaintiffs' assertions in the instant matter regarding the building employees' observations and/or knowledge, are no different.

Riverside further contends that, because it did not have actual or constructive notice of Zachary's presence in the apartment prior to January 11, 2008, it cannot be held liable for any lead-based paint injuries sustained prior to that date. It should also not be held liable for injuries sustained after January 11, 2008, because the documentary evidence, including the three letters sent by Newcastle upon receipt of Linda Lewis's 2008 Annual Notice, coupled with property management's attempts to reach Linda Lewis by telephone, to arrange for access to the apartment, demonstrate that Riverside's efforts were more than reasonable in its attempts to investigate and protect the infant plaintiff from hazards associated with both lead-based paint and a lack of window guards.

With respect to plaintiff's claim pursuant to Title X, Riverside argues that plaintiffs do not have standing to assert Title X violations because they are neither purchasers, nor lessees of the apartment. Riverside explains that, since intent of the statute was to provide "notice of lead-based paint hazards to potential purchasers or lessees" and to "provide[] a means to avoid a purchase or lease agreement in the event that such hazards are present" (*Brown v Maple3, LLC* (88 AD3d 224, 232 [2d Dept 2011]), any recovery under Title X is limited to purchasers or lessees. As plaintiff is neither, this cause of action must be dismissed.

Finally, Riverside contends that, because it acted so quickly and responsibly upon receipt of the 2008 Annual Notice, in seeking to gain access into the apartment and ameliorate any hazards, there is no basis on which to award punitive damages.

In opposition to the motion, plaintiff highlights different portions of her, her mother's and Christopher's deposition testimony, and submits a sworn affidavit in which she states that she has lived in the building almost her entire life, and specifically in apartment 3D, since she was seven years old. According to Adrienne Lewis, Riverdale or its agents had to know of Zachary's tenancy because, even though she rarely said more than "hi" when she saw them, she regularly passed by the building super and/or porter as she entered and exited the building on multiple occasions both during her pregnancy and after she gave birth. Adrienne Lewis explains that since the time Zachary came home from the hospital approximately three days after his birth, either she or her mother would be holding Zachary in their arms, or pushing him in a stroller, as they walked through the hallways, routinely passing by the building super and/or porter as they came and went from the building.

Plaintiff also points out that Riverside was in the midst of a major project to replace the building's water and gas lines during the First Year. Accordingly, in addition to the super and porter knowing of the infant plaintiff's presence, the workers, who were constantly coming in and out of apartment 3D during the renovation, also knew that there was a baby living in apartment 3D. According to Adrienne Lewis, either she or her mother was present in the apartment with Zachaty and with the workers during the many months it took to replace the lines. She supported her claim of notice by recounting an incident when Zachary was about six or eight months old. Adrienne Lewis explained about a time when the workers started yelling when they came upon asbestos within one of the apartment walls. She stated that their screaming, yelling and running about, trying to exit the apartment quickly due to the asbestos discovery, woke Zachary, who, in turn, started crying. Adrienne Lewis recalled standing in the apartment with her

son in her arms while the yelling, crying and commotion was going on (Adrienne Lewis tr at 47-48).

The New York courts have consistently determined that, where a building owner is found to have had actual or constructive notice that a child of applicable age was residing in one of its apartments, such owner must also be charged with constructive notice of a hazardous lead condition in that apartment, and liability for the child's lead-based injuries would "turn[] on the reasonableness of [the] landlord's efforts to ameliorate or prevent a dangerous lead condition" (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d at 644, 647). Here, while plaintiff does not meaningfully dispute the lack of actual notice prior to January 11, 2008, she had presented sufficient evidence to raise a material question of fact as to whether Riverside had constructive notice that a child of applicable age was residing in apartment 3D prior to that date (*Peri v City of New York*, 44 AD3d 526 [1st Dept 2007], *affd* 11 NY3d 756 [2008]).

Moreover, and as pointed out by plaintiff in her opposition, noticeably absent from Riverside's motion papers is any evidence, testimonial or by sworn affidavit, from its super or porter, pertaining to his or her knowledge of the infant plaintiff's tenancy, either before or after January 11, 2008. Riverside's unexplained failure to elicit and submit this type of evidence, supports a denial of summary judgment on the central issue of notice (*see 184 W. 10th St. Corp. v Marvits*, 18 Misc 3d 46, 49 [App Term, NY County 2007], *affd* 59 AD3d 287 [1st Dept 2009]).

With respect to Riverside's abatement efforts, while the parties dispute the reasonableness of Riverside's efforts, a determination as to the issue of reasonableness, much like the issue of constructive notice, is best left to the trier of fact to resolve (*see Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003]). Riverside is, however, entitled to a summary judgment

dismissal of plaintiff's Title X cause of action. The competent evidence conclusively establishes that Linda Lewis, and not Adrienne Lewis, was the tenant of record on this rental apartment. As only a purchaser or lessee may pursue a Title X, and Adrienne Lewis is neither, she does not have standing to maintain this cause of action, requiring its dismissal. It also appears from plaintiff's opposition papers that she has abandoned this cause of action, as she neither refutes nor otherwise addresses the Title X arguments.

Finally, Riverside is entitled to a dismissal of plaintiff's request for an award of punitive damages (which is also not directly addressed in her opposition papers). Despite what plaintiff and her mother describe as deplorable conditions stemming from decades of neglect coupled with Riverside's lack of concern for the rent-regulated tenants who refuse a "buy-out," the proof falls short of that which is necessary to support punitive damages. Unlike *Solis-Vicuna v Notias* (71 AD3d 868 [2d Dept 2010]), a lead poisoning case where an award of punitive damages was upheld under circumstances in which an owner substantially delayed commencement of abatement work, despite having received an Order to Abate from the DOH, in the instant matter, the evidence reveals that within days of receiving Linda Lewis's 2008 Annual Notice indicating the presence of a child of applicable age, Newcastle sought entry into the apartment. And while the parties may continue to dispute the reasons behind the delay in arranging for Newcastle's entry and inspection of the apartment, and why remediation work did not commence until Riverside received the Order of Abatement on or about April 3, 2008, Riverside did arrange for the infant plaintiff, Adrienne Lewis and Linda Lewis to stay in a Lead Safe House commencing when the abatement work began later that month.

Despite plaintiff's well articulated negligence claims, her evidence does not clearly and

unequivocally demonstrate "egregious and willful conduct" that is "morally culpable, or is actuated by evil and reprehensible motives" (*Munoz v Puretz*, 301AD2d at 384 [internal quotation marks and citations omitted]). Plaintiff has also not "establish[ed] . . . anything unusual or extraordinary about defendant['s] conduct which warrants punitive damages. In terms of moral culpability, this case is not singularly rare" (*id.* at 384-385 [internal quotation marks and citation omitted]).

Accordingly, it is

ORDERED that the motion for summary judgment is granted only to the extent that:

(1) plaintiff's claim pursuant to Title X of the Housing & Community Development Act of 1992, is dismissed; and

(2) plaintiff's claim for punitive damages is denied and dismissed; and the motion is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendant, with notice of entry.

Dated: Oct 9, 2014

Boris Ling-Cohan, J.S.C.

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