Alston v Pelkowski
2016 NY Slip Op 31855(U)
July 18, 2016
Supreme Court, Suffolk County
Docket Number: 07-21702
Judge: Andrew G. Tarantino, Jr.

[* 1]

SHORT FORM ORDER

ORIGINAL
WHEN BLUE

INDEX No. 07-21702
CAL. No. 14-02061OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 4-27-15 (008)
MOTION DATE 8-14-15 (009)
ADJ. DATE 10-20-15
Mot. Seq. #008 - MD
#009 - MG

ALLIYAH ALSTON, Infant by her parent and natural guardian HELENE NIEVES, and HELENE NIEVES, Individually,

Plaintiffs,

- against -

FRANCIS PELKOWSKI and BRAD SWITZER,

Defendants.

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Upon the following papers numbered 1 to 31 read on these motions for summary judgment and to amend the bill of particulars; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 22 - 29; Answering Affidavits and supporting papers 16 - 19; Replying Affidavits and supporting papers 20 - 21, 30 - 31; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Francis Pelkowski pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by plaintiffs Alliyah Alston and Helene Nieves granting leave to amend their bill of particulars pursuant to CPLR 3025 (b) is granted.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff ("the plaintiff") as a result of lead poisoning while she was a tenant at the premises located at 12 Union Avenue, Patchogue, New York. Plaintiffs allege that the defendants were negligent in, *inter alia*,

causing or permitting a dangerous and toxic condition to exist at the premises. Issue has been joined, discovery has been completed, and plaintiffs have served a verified bill of particulars and two supplemental bills of particulars regarding damages. On October 2, 2013, the court (Lasalle, J.), granted defendant Brad Switzer's motion dismissing the complaint against him on the grounds of non-ownership of the residence in question.

Defendant Francis Pelkowski now moves for summary judgment in his favor dismissing the complaint. In support of the motion Pelkowski submits, among other things, the pleadings; the decision dated October 2, 2013; the verified bills of particulars; and the deposition transcripts of Helene Nieves, and Francis Pelkowski. Plaintiffs oppose the motion and move to amend their bill of particulars to include an allegation that Pelkowski violated Federal Toxic Substances Control Act (40 CFR § 745.113) and its implementing regulations, including 42 USCA § 4852 (d). In support of the motion plaintiffs submit, the pleadings, the decision dated October 2, 2013, the verified bill of particulars, the second supplemental bill of particulars, and the note of issue.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

A landowner has a duty to maintain its premises in a reasonably safe condition (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Giulani v Union Free School Dist. #1***, 70 AD3d 632, 895 NYS2d 453 [2d Dept 2010]; ***Van Dina v St. Francis Hosp., Roslyn, N.Y.***, 45 AD3d 673, 845 NYS2d 430 [2d Dept 2007]). In order 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 (***Robinson v Bartlett***, 95 AD3d 1531, 1533, 944 NYS2d 777 [2012]; ***Cunningham v Anderson***, 85 AD3d 1370, 1371, 925 NYS2d 693 [3d Dept 2011], *lv. dismissed and denied* 17 NY3d 948, 936 NYS2d 71 [2011]). To establish constructive notice in the context of a lead paint case, the plaintiff must show "that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment (***Chapman v Silber***, 97 NY2d 9, 15, 734 NYS2d 541 [2001]; ***Van***

Wert v Randall, 100 AD3d 1079, 1080, 953 NYS2d 363 [2012]; ***Robinson v Bartlett***, 95 AD3d at 1533, 944 NYS2d 777 [3d Dept 2012]; *see* ***Williamson v Ringuett***, 85 AD3d 1427, 1428, 925 NYS2d 716 [3d Dept 2011]). On a motion for summary judgment, all five prongs of the Chapman test must be met in order to raise a triable issue of fact as to constructive notice (***see Matter of Robinson v Scafidi***, 23 AD3d 827, 828, 803 NYS2d 789 [3d Dept 2005], *lv. denied* 6 NY3d 710, 813 NYS2d 46 [2006]).

Here, Pelkowski has not established his *prima facie* entitlement to summary judgment. He has demonstrated, through his own testimony, that he did not create the defective condition. He further testified, that the issue of lead paint never came up with Ms. Nieves, and he testified that he never received notice of any peeling or chipped paint, thus denying actual notice of the alleged condition. He maintains that plaintiffs cannot show that he created the alleged defective condition, or that he had notice of it pursuant to ***Chapman v Silber***, 97 NY2d 9, 734 NYS2d 541 [2001], and therefore the complaint must be dismissed.

However, with regard to constructive notice, Pelkowski admits that he retained a right of re-entry to the premises and had a duty to make repairs. He also admits that he was aware that young children were residing in the premises. The essence of his argument for summary judgment in his favor is that he testified that he "does not recall" knowing when the premises were constructed. Therefore, he asserts, plaintiffs cannot establish that he knew that the house was constructed at a time before lead-based paint was banned. Lead-based paint was banned for residential use in the United States in 1978 by the U.S. Product Safety Commission (16 CFR 1303). With regard to this second prong of the ***Chapman*** test, plaintiffs have demonstrated by a certified copy of a Certificate of Existing Use dated May 25, 1977 for the two-family home, that it was built at least prior to 1977. Additional evidence, including the contents of the certificate, indicate that the premises "conforms substantially with all applicable laws ... prior to June 30, 1959, and permission is hereby given for use and occupancy." In other words, plaintiffs have additional evidence that the house was built prior to June 30, 1959. While Pelkowski "does not recall" when the home was built, an individual or entity purchasing rental property is presumed to acquire sufficient documentation and knowledge as to the age of the property (***Johnson v CAC Bus. Ventures, Inc.***, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]). Accordingly, factual issues exist as to this prong of the constructive notice test.

Additionally, Pelkowski testified that he was not aware that paint was peeling on the premises and he also testified that he was unaware of the hazards of lead-based paint to young children. In essence, Pelkowski's testimony denies the third and fourth prongs of the ***Chapman*** constructive notice test. Helene Nieves, however, testified that with regard to peeling paint, within a year of moving into the front apartment, approximately in 2005 or 2006, she told Pelkowski about "peeling paint coming off the windows." She testified there was chipping on the inside of all the window frames and sills. She also testified that the door leading from the living room was peeling paint on the left side of the frame, and that she complained to Pelkowski about the door frame about the same time she complained to him about the windows. A factual issue, therefore, exists as to the third prong of the constructive notice test.

With regard to Pelkowski's denial of knowledge that lead-based paint is hazardous to children, plaintiff has established that pursuant to the Federal Toxic Substances Control Act (15 USC 2696), as a lessor of housing built before 1978, Pelkowski was required to provide the lessees with written information about the danger of lead to young children with all initial leases, and if not already provided, with subsequent

renewal leases (24 CFR § 35.92 [b] [1]). As a landlord, he should have been aware of these federal requirements. Moreover, his denial of such knowledge is belied by the fact that the subject property was transferred many times, insured, financed, and refinanced and both lenders and insurers would have made defendant, a college professor at New York Maritime Academy, and attorney, aware of the risks of lead-based paint. Accordingly, as factual issues exist as to defendant's constructive knowledge of the alleged dangerous condition, defendant's motion for dismissal of the complaint is denied.

Plaintiff cross-moves to amend the bill of particulars to include an allegation that defendant violated the Federal Toxic Control Act (40 CFR § 745.113) and its implementing regulations, including 42 USCA § 4852 (d). The function of a bill of particulars is to "explain and make definite the allegations set forth in the complaint," thereby limiting the proof that may be offered at the trial (*see* ***Harmon v Peats Co.***, 243 NY 473, 476, 243 NYS 473 [1926]; *see* ***Jones v LeFrance Leasing Ltd. Partnership***, 61 AD3d 824, 877 NYS2d 424 [2d Dept 2009]; ***Valentine v Armor El. Co.***, 155 AD2d 597, 547 NYS2d 656 [2d Dept 1989]). A bill of particulars is not a pleading (*see* ***Osgood v KDM Dev. Corp.***, 92 AD3d 1222, 938 NYS2d 397 [4th Dept 2012]; ***Linker v County of Westchester***, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995]), and may not be employed to supply essential allegations of a cause of action that are missing from the complaint (*see* ***Sullivan v St. Francis Hosp.***, 45 AD3d 833, 846 NYS2d 228 [2d Dept 2007]; ***Willinger v Greenburgh***, 169 AD2d 715, 564 NYS2d 466 [2d Dept 1991]; ***Melino v Tougher Heating & Plumbing Co.***, 23 AD2d 616, 256 NYS2d 885 [2d Dept 1965]). Moreover, it may not be used to add or substitute a new theory or cause of action not asserted in the complaint (*see* ***Darrisaw v Strong Mem. Hosp.***, 74 AD3d 1769, 902 NYS2d 286 [4th Dept 2010], *affd* 16 NY3d 729, 917 NYS2d 95 [2011]; ***Bairon v City of New York***, 5 AD3d 708, 773 NYS2d 574 [2d Dept 2004]; ***Linker v County of Westchester***, 214 AD2d 652, 625 NYS2d 289).

Motions to amend or supplement a bill of particulars are governed by the same standards applied to motions to amend pleadings (***Scarangello v State of New York***, 111 AD2d 798, 798, 490 NYS2d 781 [2d Dept 1985]). Generally, leave to amend or supplement a pleading or bill of particulars "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (*see* ***Rogers v New York City Tr. Auth.***, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; ***Daly-Caffrey v Licausi***, 70 AD3d 884, 895 NYS2d 197 [2d Dept 2010]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; ***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]; ***Surgical Design Corp. v Correa***, 31 AD3d 744, 819 NYS2d 542 [2d Dept 2006]). However, when an amendment to a bill of particulars is sought after the action has been certified as ready for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (***Clarkin v Staten Is. Univ. Hosp.***, 242 AD2d 552, 552, 662 NYS2d 91 [2d Dept 1997]; *see* ***Rodgers v New York City Tr. Auth.***, 109 AD2d 535, 970 NYS2d 572; ***Schreiber-Cross v State of New York***, 57 AD3d 881, 870 NYS2d 438 [2d Dept 2008]). When leave to amend is sought on the eve of trial, judicial discretion in allowing such an amendment should be exercised "sparingly" (***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; ***Cohen v Ho***, 38 AD3d 705, 705-706, 833 NYS2d 542 [2d Dept 2007]; ***Glickman v Beth Israel Med. Ctr.- Kings Hwy. Div.***, 309 AD2d 846, 846, 766 NYS2d 67 [2d Dept 2003]; *see* ***American Cleaners, Inc. v American Intl. Specialty Lines Ins.***

Co., 68 AD3d 792, 691 NYS2d 127 [2d Dept 2009]). Further, in exercising its discretion, a court should consider how long the party seeking the amendment was aware of the facts upon which the motion is based, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (***American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.***, 68 AD3d 792, 794, 891 NYS2d 127; ***Cohen v Ho***, 38 AD3d 705, 706, 833 NYS2d 542; *see* ***Sunrise Harbor Realty, LLC v 35th Sunrise Corp.***, 86 AD3d 562, 927 NYS2d 145 [2d Dept 2011]; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Sampson v Contillo***, 55 AD3d 591, 865 YS2d 137 [2d Dept 2008]; ***Glickman v Beth Israel Med. Ctr. Kings Hwy. Div.***, 309 AD2d 846, 766 NYS2d 67).

Plaintiffs' cross motion for leave to serve the proposed amended bill of particulars is granted. Here, plaintiff does not seek to add a new theory of liability; rather the federal statute provides evidence of constructive notice to defendant. There is no prejudice to defendant, since as the lessor of a home built prior to 1978, defendant himself is in the best position to advise whether or not a disclosure was provided to plaintiffs. Contrary to defendant's position, the amendment is not patently devoid of merit as the statute applies to defendant, not as a purchaser of the property, but as a lessor of the property. Unlike ***Warshefskie v New York City Housing Auth.***, 120 AD3d 1344, 993 NYS2d 324 (2d Dept 2014), plaintiffs offer a reasonable excuse for the failure to move to amend the bill of particulars to include the federal statute earlier. That excuse, that plaintiffs were unaware of the federal statute prior to conducting legal research to oppose defendant's motion for summary judgment, does not result in surprise or prejudice to defendant and will not delay the trial of this action. Accordingly, plaintiffs' cross motion is granted.

Dated: JUL 18 2016

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION