

Brown v Webb-Weber
2017 NY Slip Op 32074(U)
October 2, 2017
Supreme Court, New York County
Docket Number: 159252/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CHRISTOPHER BROWN,

Plaintiff,

-against-

WENDY WEBB-WEBER,

Defendant.

Index No.: 159252/2014

DECISION/ORDER

Motion Sequences 9, 10 & 11

WENDY WEBB-WEBER,

Third-Party Plaintiff,

-against-

STEVEN THAU,

Third-Party Defendant.

Index No.: 595628/2016

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1-3
Opposition Affidavits/Affirmations and Memo of Law annexed	4-6
Reply Affidavits/Affirmations/Memos of Law annexed	7-9

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Christopher Brown (“Plaintiff”), who is now a 20-year old high school student, brought this action against Defendant/Third-Party Plaintiff Wendy Webb-Weber (“Webb-Weber”) for injuries he sustained in 1998-2000 when he was one to three years old due to exposure to defective, peeling and chipped lead paint when he and his family resided in the premises owned by Webb-Weber from July 1998 to July 2003. Plaintiff further alleges that Webb-Weber was negligent in her ownership, management, maintenance and operation of the premises and in her failure to abate the lead hazard within a reasonable time. Plaintiff further alleges that such exposure resulted in four elevated lead blood levels within 7 ½ months and Webb-Weber’s failure to abate the hazardous condition caused Plaintiff to suffer injuries, including severe cognitive, attentional, academic, and intellectual deficits involving developmental delays in speech, physical ability and mental ability, among other damages.

Defendant Webb-Weber brought a third-party complaint for contribution and indemnification against Third-Party Defendant Steven Thau under Index No. 595628/2016. Thau owned the premises where Plaintiff resided in June 1997-July 1998, prior to moving into Webb-Weber's building. Both apartments were approved Section 8 residences. This court severed the third-party action on November 28, 2017, but the caption was never changed.

There are three motions pending before this court: 1) Defendant Webb-Weber moves for summary judgment dismissal of Plaintiff's complaint under motion sequence 009; 2) Third-Party Defendant Thau moves to consolidate the third-party action with the main action under motion sequence 010; and 3) Third-Party Defendant Thau moves for summary judgment dismissal of Defendant/Third-Party Plaintiff Webb-Weber's third-party complaint against him under motion sequence 011. These motions have been consolidated for purposes of this decision. For the reasons set forth herein, the court denies Webb-Weber's motion for summary judgment dismissal of Plaintiff's complaint, grants Thau's motion for summary judgment dismissal of Webb-Weber's third-party complaint and denies Thau's motion to consolidate as moot.

Plaintiff was born in March 1997 and three months later, in June 1997, his mother, Charise Kee, moved Plaintiff and his family to an apartment owned by Thau located at 109 North Terrace Avenue in Mount Vernon, New York. Plaintiff tested positive for blood lead twice while residing in this apartment. On July 17, 1997, when Plaintiff was four months old, he tested at a level of 1.0 micrograms of lead per decileter of blood (mcg/dL or ug/dL) and on April 30, 1998, when he was about a year old, he tested at 1.3 mcg/dL. Plaintiff's mother testified in substance that she complained to Thau about peeling paint in the apartment and was aware of the dangers of lead paint. She did not notice any hyperactivity in Plaintiff while he lived in Thau's apartment and she did not notice him eating any paint chips. Additionally, there was no testimony about Plaintiff missing any milestones while residing in Thau's apartment. Plaintiff's pediatrician did not raise any concerns about the two positive tests for lead levels and the county took no action.

In January 1998, Thau's apartment was found by a Section 8 inspector to have peeling paint and other damage and the landlord was ordered to make necessary repairs. However, no lead testing was done at this time and Thau was not told that he had to abate a lead condition. Although Thau testified that he did not recall whether he made the repairs, Plaintiff's mother said that he did not and Webb-Weber argued that Section 8 withdrew his subsidy for failing to make the necessary repairs. Thau sold the building in 2000. Last year, in July 2016, lead testing of this apartment was conducted for the first time and it indicated that the premises contained lead paint.

In July 1998, Plaintiff moved out of Thau's apartment and into Webb-Weber's apartment, located at 222 East 5th Street in Mount Vernon, New York. A Section 8 inspector checked the apartment before Plaintiff moved in and noted that there was no peeling paint and that lead paint was not applicable, but no testing was conducted. Plaintiff was tested with elevated blood lead levels on four occasions while residing in this apartment: 1) October 1, 1999, after living in the apartment for 15 months, Plaintiff had a blood lead level of 22 mcg/dL; 2) November 8, 1999, Plaintiff had a level of 15.3 ug/dL; 3) February 18, 2000, Plaintiff tested at a level of 14 ug/dL; and 4) May 16, 2000, Plaintiff had a level of 12.3 ug/dL. On September 27, 2000, Plaintiff had a level of 8 ug/dL and the doctors stopped testing him.

After the level 22 test on October 1, 1999, the Westchester County Department of Health (WCDOH) inspected and tested the premises on October 19, 1999 and found chipped and peeling lead-based paint and lead dust inside of the apartment which created a hazardous lead condition. There was a notation in the report that Plaintiff's mother had observed Plaintiff picking at and eating paint chips in the apartment. Plaintiff was also treated for elevated lead levels and took iron drops and received services for his delayed speech.

Plaintiff alleges that Webb-Weber failed to abate the hazardous condition within a reasonable time after having actual notice of the condition. On October 20, 1999, WCDOH sent a letter to Webb-Weber advising her of Plaintiff's lead poisoning, the hazardous lead conditions in the premises and ordered her to abate the condition in a safe and efficient manner. Although Webb-Weber was required to submit a written proposed work plan to the WCDOH within ten days upon receipt of the notice, she did not do so until December 3, 1999, over two months later and almost one month after Plaintiff's 15.3 test. Plaintiff alleges that Webb-Weber caused the delays by challenging the WCDOH report, attempting to have Plaintiff and his family relocated to another apartment, concerning herself with the cessation of her Section 8 rent subsidy, attempting to get a grant instead of paying for it herself and further delaying the abatement by waiting until January 2000 to begin the grant application process. Because of her delay tactics, Webb-Weber was fined \$250 for violating the abatement order and she did not abate the hazardous condition until November 2000. Webb-Weber sold the building shortly thereafter. Plaintiff and his family were relocated to a hotel during the abatement process from mid-May to November 2000, which was initially only estimated to take nine days. Therefore, Plaintiff's mother brought him back to the apartment on weekends to pick up additional clothing and other items that they did not realize they would need.

Webb-Weber argues in substance that Plaintiff failed to demonstrate that Webb-Weber had actual or constructive notice of a defective, hazardous lead paint condition at the premises prior to Plaintiff's diagnoses of an elevated lead blood level of 22, which was his third positive test, as required by *Andrade v. Wong* and *Chapman v. Silber* (*Andrade v. Wong*, 251 AD2d 609 [2d Dept 1998]) and *Chapman v. Silber*, 97 NY2d 9 [2001]). Additionally, Plaintiff failed to demonstrate causation through a qualified expert, like a toxicologist, to establish that Plaintiff was exposed to a specific quantity of lead exclusively from Webb-Weber's apartment, and not from lead found in the daycare located in the building next door at 224 East 5th Street or in Thau's building, that is generally accepted by the scientific community to cause Plaintiff's alleged specific injuries as mandated by *Parker v. Mobil Oil Corp.* (*Parker v. Mobil Oil Corp.*, 7 NY3d 434 [2006]). Also, Plaintiff failed to demonstrate differential diagnosis to distinguish the alleged developmental delays from the periods before and after he lived in Webb-Weber's apartment and after his blood lead levels were within normal range. Webb-Weber also makes numerous challenges to the validity of Plaintiff's expert pediatrician's report.

Webb-Weber further argues that Plaintiff's mother further exposed him to the alleged hazardous condition by refusing to move out of the apartment when Section 8 representatives offered to relocate her and when she repeatedly returned to the apartment when the abatement work was being conducted, despite WCDOH officials warning her that she needed to be out of the apartment during this period. Webb-Weber contends that she followed the abatement guidelines and schedule set forth by Westchester County and was not negligent in failing to abate the condition within a reasonable time. Any delays in abatement were not within Webb-Weber's

control. Additionally, Plaintiff's allegations are inappropriate because Plaintiff's blood lead level decreased significantly and Plaintiff improved prior to the abatement.

It is undisputed that Plaintiff failed to show that Webb-Weber had any constructive or actual notice of a lead paint hazardous condition in the premises prior to Plaintiff's diagnosis of an elevated blood lead level in October 1999. However, Plaintiff argues in substance that Webb-Weber was negligent in failing to abate the condition until November 2000, which was 13 months after WCDOH directed her to do so.

Third-Party Defendant Thau argues in substance that he is entitled to summary judgment dismissal of the third-party complaint against him because Third-Party Plaintiff Webb-Weber failed to establish that each of Plaintiff's alleged injuries or his elevated lead blood levels were proximately caused by a hazardous lead condition related to Thau's premises within a reasonable degree of scientific certainty. Therefore, any argument that Thau had actual or constructive notice of a hazardous lead condition is moot. Additionally, Thau argues that there was no evidence that Plaintiff was observed eating paint chips in Thau's residence or that Thau was ordered to abate a lead condition. Thau relied on Webb-Weber's and Plaintiff's experts' reports to argue that levels of 1.0 and 1.3 are normal and well below the Center for Disease Control and Prevention's threshold of blood lead elevation and toxicity and that such levels did not cause Plaintiff's severe cognitive deficits and delays or any of Plaintiff's documented elevated blood lead levels. Also, these experts referred to Plaintiff's first elevated lead blood level as the level 22 test in October 1999, so they did not consider the levels of 1.0 and 1.3 to be elevated.

Webb-Weber opposes Thau's motion for summary judgment and argues in substance that material issues of fact remain, including whether Thau had constructive notice of the hazardous lead condition on the premises under *Chapman* (*Chapman*, 97 NY2d 9). Webb-Weber's expert opined that the amount of lead found in Thau's apartment in 2016 was sufficient to be the source of Plaintiff's positive lead tests in 1997 and 1998. Additionally, although Thau denies it based on the evidence, one of Webb-Weber's expert alleged that Plaintiff exhibited hyperactivity, falling and early language delays while he still lived in Thau's apartment and that such falling and head trauma could have caused his early speech and language delays.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Based on the admissible evidence submitted, when considering the facts in the light most favorable to the non-movants, the court finds that Webb-Weber and Thau both failed to establish their entitlement to summary judgment in their favor as a matter of law, and even if they had, then the non-movants raised several material issues of fact in dispute which preclude summary judgment dismissal of the complaint and third-party complaint.

The court denies Webb-Weber’s motion for summary judgment dismissal of Plaintiff’s complaint because the court finds that Webb-Weber failed to demonstrate her entitlement to summary judgment in her favor as a matter of law. The evidence demonstrates that Plaintiff’s blood lead level was only tested at 1.0 and 1.3 prior to him residing in Webb-Weber’s apartment. Then, after living in the apartment for 15 months, he had an elevated lead blood level of 22, plus three additional elevated lead blood tests within a 7 ½ month period while residing in the premises. When viewing the facts in the light most favorable to Plaintiff, the court is not persuaded by Webb-Weber’s arguments that Plaintiff failed to demonstrate that Webb-Weber was negligent in failing to abate the alleged hazardous condition within a reasonable time as it took approximately seven months to begin the abatement work and almost 13 months until it was completed, or that her actual notice upon Plaintiff’s diagnosis of lead poisoning is insufficient under these circumstances. The court is also not persuaded by Webb-Weber’s arguments regarding the impact of Plaintiff’s decreased blood lead levels, or that any other arguments asserted by Webb-Weber support summary judgment in her favor as a matter of law. Furthermore, the court determines that Plaintiff’s expert report adequately establishes causation to the specific injuries and damages alleged and sufficiently links the cause of such damages to the alleged hazardous lead paint condition in Webb-Weber’s apartment.

Additionally, the court determines that Plaintiff’s arguments raise several issues of material fact in dispute to preclude summary judgment to Webb-Weber, including, but not necessarily limited to, whether Webb-Weber was negligent in failing to abate the alleged hazardous lead paint condition in the premises within a reasonable time under the circumstances; whether Plaintiff’s additional exposure to the alleged hazardous lead condition and subsequent elevated blood lead levels were caused by Webb-Weber’s unreasonable delay; whether such delay contributed to Plaintiff’s alleged injuries; whether Plaintiff’s injuries were caused by his exposure to lead inside of Webb-Weber’s premises or at another location; and whether Plaintiff’s lead blood levels caused each of Plaintiff’s alleged injuries within a reasonable degree of scientific certainty.

The court grants Third-Party Defendant Thau’s motion for summary judgment dismissal of Webb-Weber’s third-party complaint and finds that Thau met his burden of demonstrating his entitlement to summary judgment as a matter of law and Webb-Weber failed to raise a material issue of fact to preclude summary judgment. Thau demonstrated that Plaintiff’s blood lead levels of 1.0 at four months old, just one month after he moved into the premises, and 1.3 at 13 months old, a little over two months before he moved out of the apartment were within normal range and

did not alert Plaintiff's pediatrician or county officials to be concerned about Plaintiff's exposure to an excessive amount of lead. Also, there is no evidence that Plaintiff's reading of 22, which occurred over one year after Plaintiff moved out of Thau's apartment, can be attributed to Thau's apartment. Furthermore, the evidence proves that Thau's apartment was never tested for lead until 18 years after Plaintiff moved out and 16 years after Thau sold the building. Additionally, there is no evidence that Plaintiff was observed eating peeling paint chips in Thau's building or that Plaintiff failed to meet any speech or language milestones while he resided in the premises, despite Webb-Weber's interpretation of Plaintiff's mother's testimony. Therefore, any allegations that Plaintiff's positive blood lead levels or alleged injuries were caused by hazardous lead conditions inside of Thau's apartment would be purely speculative and unsupported by the evidence. Therefore, the court dismisses Webb-Weber's third-party complaint against Thau.

Additionally, since Webb-Weber's third-party complaint is dismissed, the court denies Thau's motion to consolidate the third-party action with the main action as moot.

As such, it is hereby

ORDERED that under motion sequence 009, the court denies Defendant/Third-Party Plaintiff Wendy Webb-Weber's summary judgment motion to dismiss Plaintiff Christopher Brown's complaint against her with prejudice and without costs; and it is further

ORDERED that under motion sequence number 010, the court denies Third-Party Defendant Steven Thau's motion to consolidate Defendant/Third-Party Plaintiff Wendy Webb-Weber's third-party action under Index Number 595628/2016 with the main action under Index Number 159252/2014 as moot; and it is further

ORDERED that under motion sequence 011, the court grants Third-Party Defendant Steven Thau's summary judgment motion to dismiss Defendant/Third-Party Plaintiff Wendy Webb-Weber's third-party complaint against him with prejudice and without costs, the Clerk is directed to enter judgment in favor of Third-Party Defendant Steven Thau as against Defendant/Third-Party Plaintiff Wendy Webb-Weber and the Clerk is directed to amend the caption to sever and remove the third-party action from the main action as per the court's order to sever, dated November 28, 2017, and to dismiss this action as directed herein.

Date: October 2, 2017


HON. ERIKA M. EDWARDS