

**S.M. v 1170 Dean LLC**

2019 NY Slip Op 33548(U)

November 4, 2019

Supreme Court, Kings County

Docket Number: 512178/2017

Judge: Larry D. Martin

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
Part 41**

-----X  
**S.M. an infant by his mother and natural guardian,  
VICTORIA MASSO and VICTORIA MASSO,  
Individually,**

**Plaintiff,**

**Index no. 512178/2017  
DECISION/ORDER**

**-against-**

*ms#3*

**1170 DEAN LLC,**

**Defendant.**

-----X  
**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this  
motion for summary judgment.**

<b>PAPERS</b>	<b>NUMBERED</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Sur-Reply Affidavits</b>	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Plaintiffs S.M., an infant by his mother and natural guardian, Victoria Masso, and Victoria Masso individually, commenced this action against Defendant 1170 Dean LLC for injuries incurred as a result of the infant's alleged exposure to lead-based paint while living at 1170 Dean Street in Brooklyn, New York, a building owned by Defendant.

Defendant now moves for an order granting summary judgment and dismissing Plaintiffs complaint. Plaintiffs oppose the motion.

**FACTUAL BACKGROUND**

Victoria Masso and her husband moved to 1170 Dean Street, Apartment 1 in or around August 2016 with their two infant sons. The infant Plaintiff was one years old at the time.

In July 2016, two months before the Plaintiffs moved in, the entire building had received a gut renovation. The building is a prewar building with four floors and included a laundry room accessible through the same entrance used to access the Masso apartment. The apartment was located on the ground level of the building and was accessible through an entrance separate from the main entrance of the building. This entrance has a metal gate which led to a corridor. The apartment entrance was down the corridor to the left. The apartment included access to a private backyard accessible through the back door of the apartment and only for the exclusive use of the Masso family. The backyard was paved with concrete with exposed dirt/soil bordering along the sides and back of the yard. Ms. Masso testified that her sons, including infant Plaintiff, would play in the backyard in the mud and on the concrete multiple times a day on most days. Ms. Masso testified that she would see the infant Plaintiff put soil in his mouth and putting his hands on his mouth while playing in the backyard.

On September 20, 2016, the infant Plaintiff had a venous blood lead test that indicated a blood lead level of 5 ug/dL. On October 19, 2016, infant Plaintiff had another venous blood lead test indicating a blood lead level of 10 ug/dL. On December 6, 2016, the infant Plaintiff showed a blood lead level of 5 ug/dL. On May 10, 2017, the infant Plaintiff's blood lead level was 3.3 ug/dL.

On November 16, 2016, the NYC Department of Health and Mental Hygiene (DOH) tested the premises but found no lead-based paint hazards inside the Masso apartment. DOH did find elevated lead content in the metal gate and three cement walls of the "foyer from the front yard." DOH issued four violations for this area and an order to abate the lead-based paint hazards. Defendant describes the foyer/vestibule area as an exterior part of the building and outside of the entrance door which provides access to the Masso apartment and the laundry room for use by all tenants. Plaintiff describes this same area as being between the metal gate entrance and the Masso apartment in the vestibule or corridor.

On November 19, 2016, DOH returned to the subject premises and took a composite soil sample from the backyard. The laboratory analysis of the composite soil sample found that the soil sample tested above EPA hazard level guidelines for lead. "[DOH] recommend[ed] that the [Defendant] cover the bare soil by planting grass, piling mulch, or placing sand on top of the existing soil, or landscaping using sod and bushes."

On December 15, 2016, the Masso family vacated the premises.

### ANALYSIS

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see also *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also, *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, supra, 49 N.Y.2d 557 [1980]).

#### *Local Law 1*

Defendant contends that the presumption of Local Law 1 does not apply to the soil in the backyard garden nor to the foyer/vestibule area of the building that tested positive for lead.

“It has long been the rule in this State that a regulation of an administrative agency is merely some evidence to be considered on the question of a defendant’s negligence” (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 642-643 [1996]). The New York City Childhood Lead Poisoning Prevention Act (“Local Law 1”) imposes a duty on multiple dwelling landlords to remove or cover lead-based paint in a dwelling unit in which a child or children six years of age and under reside if the building was built prior to 1960 (New York City, N.Y., Code § 27-2056.1 et seq.).

Violation of Local Law 1, however, does not result in absolute liability for injuries caused by exposure to lead. Rather, a plaintiff must establish that the landlord had actual or constructive notice of the condition for a period of time such that, in the exercise of reasonable care, the condition should have been remedied. In a multiple dwelling erected prior to 1960, it is presumed that “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” (New York City, N.Y., Code § 27-2056.5(a)). “An owner shall take action to prevent the reasonably foreseeable occurrence of such

a condition and shall expeditiously remediate such condition and any underlying defect, when such underlying defect exists..." (New York City, N.Y., Code § 27-2056.3).

### **Soil in the backyard**

Defendant contends that the presence of lead in the soil of the backyard is not within the statutory definition of lead-based paint hazards under Local Law 1 and that defendant lacked notice of any hazardous condition in the soil.

Lead-based paint hazard is defined as "any condition in a dwelling or dwelling unit that causes exposure to lead from lead-contaminated dust, from lead-based paint that is peeling, or from lead-based paint that is present on chewable surfaces, deteriorated subsurfaces, friction surfaces, or impact surfaces that would result in adverse human health effects" (New York City, N.Y., Code § 27-2056.2(6)).

Defendant asserts that none of the exposure sources listed within Local Law 1 either constitutes or applies to soil. The look at the different exposure sources identified in Local Law 1 show that soil is not an exposure source within the statute.

Lead-contaminated dust is "dust containing lead at a mass per area concentration of 10 or more micrograms per square foot on a floor, 50 or more micrograms per square foot on window sills, and 100 or more micrograms per square foot on window wells, or such more stringent standards as may be adopted by rule of the department of health and mental hygiene..." (New York City, N.Y., Code § 27-2056.2(8)(a)). Lead-based paint is "paint or other similar surface coating material containing 1.0 milligrams of lead per square centimeter or greater..." (New York City, N.Y., Code § 27-2056.2(7)(a)).

Chewable surface means "a protruding interior window sill in a dwelling unit in a multiple dwelling where a child of applicable age resides, and which is readily accessible to such child. Chewable surface shall also mean any other type of interior edge or protrusion in a dwelling unit in a multiple dwelling, such as a rail or stair, where there is evidence that such other edge or protrusion has been chewed or where an occupant has notified the owner that a child of applicable age who resides in that multiple dwelling has mouthed or chewed such edge or protrusion" (New York City, N.Y., Code § 27-2056.2(1)).

“Deteriorated subsurface shall mean an unstable or unsound painted subsurface, an indication of which can be observed through a visual inspection, including, but not limited to, rotted or decayed wood, or wood or plaster that has been subject to moisture or disturbance” New York City, N.Y., Code § 27-2056.2(3)).

“Friction surface shall mean any painted surface that touches or is in contact with another surface, such that the two surfaces are capable of relative motion and abrade, scrape, or bind when in relative motion. Friction surfaces shall include, but not be limited to, window frames and jambs, doors, and hinges” (New York City, N.Y., Code § 27-2056.2(4)).

“Impact surface shall mean any interior painted surface that shows evidence, such as marking, denting, or chipping, that it is subject to damage by repeated sudden force, such as certain parts of door frames, moldings, or baseboards” ((New York City, N.Y., Code § 27-2056.2(5)).

None of the above definitions for lead-based paint hazards apply to the soil in question in this action. Thus, Local Law 1’s presumption is not applicable to lead found in the soil.

#### **Foyer/vestibule area**

Defendant further contends that the foyer/vestibule area testing positive for lead is an *exterior* section of the building not subject to Local Law 1 because it is not accessible to the infant plaintiff and could not have caused the alleged injuries. The foyer/vestibule area is the only entrance to the Masso apartment as well as the entrance for other tenants to access the laundry room.

Defendant argues that Local Law 1 does not apply to the foyer/vestibule area because it is not within the definition of “dwelling” as defined by DOH. Contrary to Defendant’s argument, Local Law 1 is applicable to “common areas,” which is defined as “a portion of a multiple dwelling that is not within a dwelling unit and is regularly used by occupants for access to or egress from any dwelling unit within such multiple dwelling” (New York City, N.Y., Code § 27-2056.2(2)). Based on this definition, the court finds that the foyer/vestibule area serving as the Masso family’s only entrance into their apartment and used by other tenants to access the laundry room is a common area within Local Law 1.

Further, Defendant may be charged with constructive notice of defects in those parts of the building into which it has authority to enter (*see Juarez v Wavecrest Mgmt. Team Ltd.*, 88 NY2d

628, 647 [1996]). There is no dispute that Defendant maintained authority to enter the foyer/vestibule area. Thus, Defendant may be charged with constructive notice of the lead-paint hazard in the foyer/vestibule area as it is a common area within the meaning of Local Law 1 and Defendant retained authority to enter this area.

### ***Common Law Premises Liability***

Defendant also contends that plaintiff cannot sustain the burden of proof for common law premises liability.

“Under New York common law, a landowner has a duty to maintain his or her premises in a reasonably safe condition. 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” (*Green v Mullen*, 127 AD3d 696, 697 [2d Dept 2015]).

Defendant argues that plaintiff cannot prove that Defendant had a duty to test the backyard for lead and to abate such condition nor did it have notice of the presence of lead in the soil prior to notification by DOH. For reasons stated above, Defendant had no duty to test the backyard for lead nor did it have actual or constructive notice of the presence of lead in the soil.

Defendant further argues that the foyer/vestibule area is for an exterior area of the building and there is no evidence that could support a reasonable inference by the jury that the lead paint found in that area was a substantial cause of the infant plaintiff’s alleged injury. Based on the pictures provided by Defendant of the foyer/vestibule area, it is not clear that this area is a part of the exterior of the building. Plaintiff’s opposition describes the walls as located between the metal gate entrance and the Masso apartment in the vestibule or corridor. Further, as mentioned above, the foyer/vestibule is a common area of the building used by the Masso family to enter and exit the building as well as used by other tenants.

Defendant states that there is no evidence that the child had exposure to lead in this area since the infant’s mother testified that she never observed him eating paint chips or playing in this area. Plaintiff’s expert affidavit raises issues of fact as to whether the child was exposed to lead from the foyer/vestibule area by way of dust being tracked from this area.

Thus, there are questions of fact as to whether defendant had constructive notice of a lead-based paint condition in the foyer/vestibule area and whether the exposure to lead in this area was a proximate cause of the infant Plaintiff's alleged injuries.

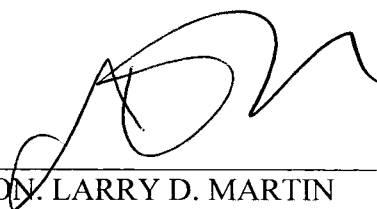
***Warranty of Habitability***

Defendant asserts that the cause of action of breach of warranty of habitability cannot be sustained as a matter of law because Defendant lacked actual or constructive notice. For reasons stated above, this branch of defendant's motion is denied.

***Loss of Services***

Defendant also asserts that the mother's derivative action must also be dismissed. This branch of Defendant's motion is denied.

Dated: 11/4/19



HON. LARRY D. MARTIN  
J.S.C.

HON. LARRY D. MARTIN  
Justice of the Supreme Court

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KINGS COUNTY CLERK  
FILED

