

E.S. v Windsor Owners Corp.

2022 NY Slip Op 34688(U)

August 29, 2022

Supreme Court, New York County

Docket Number: Index No. 159133/2017

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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E. S., AMINATA SY,

Plaintiff,

- v -

WINDSOR OWNERS CORP., TUDOR REALTY SERVICES CORP., MARTINA SERSCH

Defendant.

-----X

INDEX NO. 159133/2017

MOTION DATE 05/03/2022

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiffs commenced this action to recover for alleged lead poisoning suffered by infant plaintiff E. S. as a result of lead paint present in apartment 109 of 5 Tudor City Place, New York, New York in a building owned by defendant Windsor Owners Corp. and managed by defendant Tudor Realty Services Corp. (collectively the "Owners"). The shares of the apartment were owned by defendant Martine Sersch.

The plaintiff moves for summary judgment as to liability as against all defendants. Defendant Sersch cross-moves against the Owners to dismiss the contractual indemnity cross-claims.

Facts

The facts underling this motion appear to not be in much dispute. The infant plaintiff resided at the subject location with her mother from August 2016 to June 30, 2017 through a

written sublease with defendant Sersch. The infant plaintiff was later diagnosed with lead poisoning. According to the documents presented, blood tests in May 2017 revealed that E.S. had elevated blood levels of 12 mcg/dl and lead poisoning. Soon thereafter, in June 2017, the Department of Health determined that there were numerous areas of the apartment that contained peeling and chipping paint that contained hazardous levels of lead, which led the Commissioner of Health to order Owners to remove, correct and/or otherwise abate the lead paint violations. Although given the opportunity to do so, Windsor did not challenge the Order to Abate Nuisance or the validity of the DOH's findings.

It appears undisputed that were the Owners aware of the presence of a child under the age of 7 (it is undisputed that the infant plaintiff was under age 7 while residing at the subject building,) the Owners would have been obligated under Administrative Code Section, to ameliorate this condition. It is undisputed that the defendant Owners were never told about the sublease agreement.

The plaintiffs contend that the Owners had constructive notice of the existence of a child living at this location through the testimony of plaintiff Sy in this case. Plaintiff Sy testified that she was using the building's automated management system using her own name and picture; she also introduced herself to the doorman, when she moved in, as the new tenant in apartment 109, with her children present. Plaintiff Sy further testified about many interactions with agents of the Management regarding the apartment unit she was occupying, some of which were in the presence of E.S., like her daily comings and goings by the main entrance or her multiple maintenance requests. The plaintiffs claim as this testimony has not been rebutted, the plaintiffs are entitled to judgment as a matter of law as to liability, as there is no question of fact that the Owners were aware of the existence of the infant plaintiff living at the subject building. The defendants contend

there is a question of fact, citing case law that the intermittent awareness of a person at a building is not enough for a finding of liability as a matter of law by the plaintiffs.

Discussion

Plaintiff's Summary Judgment Motion

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Plaintiffs have submitted un rebutted evidence that the Owners had constructive notice that a child below the age of 7 lived on the premises and nevertheless failed to comply with New York City's lead abatement laws through the extensive interactions testified to by plaintiff Sy. This case is distinguishable from the cases cited by the Owners as these interactions that plaintiff relates were not intermittent occurrences, but daily contacts between the plaintiff and employees of the Owners.

The Court also agrees that summary judgment for plaintiffs as against defendant Sersche is appropriate. Defendant Sersche was the owner of the shares for the apartment in question. Defendant Sersche testified that she was aware that the plaintiff had small children, since plaintiff Sy had mentioned that a child under 7 years of age resides in the unit in the sublease agreement.

This defendant also failed to submit the required sublease agreement to the Owners that would have alerted the Owners to the existence of small children, thus the need for lead remediation. There is simply no way that a reasonable finder of fact would not find liability on the part of defendant Sersche

The Court however denies the motion as to defendant Tudor Realty Services Corp. as this defendant was not the owner of the building in question, and the subject Administrative Code provisions puts requirements specifically on owners, not managing agents.

Lastly, this Court declines to deny the plaintiff's motion as against Windsor on the ground that defendant Sersch was a co-habitant of the apartment in question. To this Court, this is a feigned issue of fact as the sublease to this Court is very clear that defendant Sersch was not to reside at the apartment during the sublease period.

The Cross Motion

The cross motion by defendant Sersch to dismiss the claims sounding in indemnity is granted as to defendant Windsor only. As this Court has found liability against defendant Windsor, Windsor may not get indemnity as against co-defendant Sersch, under the provision of General Obligations Law Section 5-321, which does not allow for an entity to be indemnified for its own wrongdoing. The argument by defendant Sersche that the General Obligations Law is inapplicable to this matter as the hold harmless language in the lease only covers acts or omissions of defendant Sersche is unavailing, as any indemnification from the contract would still ameliorate the liability of a negligent party. Moreover, nothing from this decision prevents Windsor from seeking other relief as against defendant Sersche for defendant Sersche's negligence, such as through contribution.

The Court does not reach the issue of whether all cross-claims should be dismissed, as this relief was not sought by defendant Sersche in her cross-motion, and this Court declines to search the record without the other parties being made aware that such other relief was being sought. It is therefore

ORDERED that the plaintiffs' motion for summary judgement on the issue of liability is granted except as to defendant Tudor Realty Services Corp, against whom the motion is denied; and it is further

ORDERED that the contractual indemnification cross claim pled by defendants WINDSOR OWNERS CORP., and TUDOR REALTY SERVICES CORP., is dismissed.

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8/29/2022

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE