Lopez v 506-510 Assoc., LLC
2017 NY Slip Op 30921(U)
April 12, 2017
Supreme Court, Bronx County
Docket Number: 14040/2004
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PAOLA LOPEZ, an infant under the age of 14 years, by her mother and natural guardian, LUCIA GONZALEZ, and LUCIA GONZALEZ, Individually,

Plaintiffs,

v.

506-510 ASSOCIATES, LLC, PROTO REALTY MANAGEMENT CORP., ASBESTWAY ABATEMENT CORP., COMPLIANCE INSPECTION SERVCICE, LLC, 510 W. 150TH STREET and DALAN MANAGEMENT ASSOCIATES, INC.,

Defendants.

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Index No. 14040/2004

DECISION AND ORDER

GONZALEZ, D.:

Upon: i) the Notice of Motion, dated October 27, 2015, by Angela Lurie Milch, Esq., attorney for defendants 510 W. 150th Street, LLC and Dalan Management Associates, Inc., for an order dismissing the action and all cross-claims, pursuant to CPLR Rule 3212, on the grounds that defendants 510 W. 150th Street, LLC and Dalan Management Associates, Inc. did not breach their duty to the infant plaintiff and were not the proximate cause of the infant plaintiff's injuries, and for such other, further and different relief as this Court may deem just, proper and equitable; ii) the Affirmation in Opposition to Defendant's Motion for Summary Judgment, dated January 29, 2016, by James P. Tenney, Esq., attorney for defendants 506-510 Associates LLC and Proto Realty Management Corp.; iii) the Affirmation in Opposition to Defendant's Motion for Summary Judgment, dated February 11, 2016, by Liza A. Milgrim, Esq., attorney for plaintiffs; and iv) the Affirmation in Opposition to Defendant's Motion for Summary Judgment, dated March 4, 2016,

by Patricia Alarcon Demetri, Esq., attorney for defendant Asbestway Abatement Corp.; v) the Reply Affirmation, dated July 22, 2016, by Angela Lurie Milch, Esq.

PROCEDURAL HISTORY

The action was commenced by the filing of the Summons and Verified Complaint on March 26, 2004 against defendants 506-510 Associates LLC. ("506-510") and Proto Realty Management Corp. ("Proto"). Issue was joined by service of the defendants' Answer on or about April 14, 2004. A third-party complaint was filed and served by defendants 506-510 and Proto against defendant Asbestway Abatement Corp. ("Asbestway") on or about March 11, 2005. Issue was joined on the third-party action by service of the defendant Asbestway's Answer on or about May 17, 2005.

A second action was commenced by the plaintiff under Index Number 350228/2008, with the filing of the Summons and Verified Complaint on April 8, 2008 against defendants Asbestway, Compliance Inspection Service LLC, ("Compliance"), 510 W. 150th Street, LLC. ("510 W. 150th"), and Dalan Management Associates, Inc. ("Dalan"). Issue was joined by defendants 510 W. 150th and Dalan on or about May 22, 2008. Issue was joined by defendant Asbestway on or about June 3, 2008. Plaintiff moved to consolidate the actions. By Order, dated March 27, 2009, the actions were consolidated under the original Index Number. To date, issue has not been joined by defendant Compliance.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff arising from lead poisoning at the premises located at 506 W. 150th Street, in the County, City and State of New York ("premises"). It is alleged that from November 12, 2000 through on

or about the Summer of 2007, the infant plaintiff was exposed to lead at the premises in question. The following blood lead levels were found:

- 23 micrograms/deciliter on December 3, 2003
- 18 micrograms/deciliter on January 27, 2004
- 21 micrograms/deciliter on March 3, 2004
- 58 micrograms/deciliter on June 30, 2004
- 39 micrograms/deciliter on July 2, 2004
- 20 micrograms/deciliter on July 8, 2004
- 15 micrograms/deciliter on August 20, 2004
- 18 micrograms/deciliter on September 14, 2004
- 51 micrograms/deciliter on November 12, 2004
- 44 micrograms/deciliter on November16, 2004
- 15 micrograms/deciliter on December 2, 2004
- 23 micrograms/deciliter on January 6, 2005
- 18 micrograms/deciliter on February 10, 2005
- 15 micrograms/deciliter on March 10, 2005
- 16 micrograms/deciliter on May 12, 2005
- 13 micrograms/deciliter on September 8, 2005
- 11 micrograms/deciliter on December 8, 2005

From November 12, 2000 through November 1, 2004, the premises was owned by defendant 506-510 and managed by defendant Proto. On July 8, 2004, the infant plaintiff received chelation therapy due to elevated blood lead levels. Thereafter, the infant plaintiff was again diagnosed with elevated blood lead levels on November 12, 2004. On November 2, 2004, the premises was purchased by defendant 510 W. 150th, and managed by defendant Dalan. On November 16, 2004, the infant plaintiff received chelation therapy due to elevated blood lead levels.

ARGUMENT

The defendants 510 W. 150th and Dalan move for summary judgment arguing they did not breach their duty to the infant plaintiff because the defendants 510 W. 150th and Dalan acted reasonably under the circumstances by performing abatement measures as soon as the abatement order was received. The defendants 510 W. 150th and Dalan claim the elevated blood lead levels in the infant plaintiff were not causally related to exposure to lead-based paint at the premises but a "rebound" effect from the plaintiff's chelation therapy for lead poisoning. In support of their motion for summary judgment, the defendants 510 W. 150th and Dalan submit the affidavit of Dr. Walter Molofsky, a board-certified doctor in pediatrics and neurology, and the affidavit of Vincent Coluccio, a professional consultant on lead poisoning prevention.

Defendants 506-510 and Proto contend the elevated blood lead levels in the infant plaintiff were not a result of chelation therapy but exposure to lead-based paint at the premises. Defendants 506-510 and Proto submit the affidavit of forensic toxicologist Arlene Weiss, MS in opposition to the instant motion indicating that any purported rebound effect from the chelation therapy would have occurred two through four weeks after chelation therapy.

Plaintiffs contend the premises had open, uncorrected lead paint violations at the time defendant 510 W. 150th purchased the premises. Yet, defendants 510 W. 150th and Dalan did not perform abatement measures on the premises until after an Order to Abate 23 lead paint violations was issued on November 30, 2004.

Defendant Asbestway contends defendants 510 W. 150th's and Dalan's failure to perform abatement measure during the first twenty-eight (28) days that defendants 510 W. 150th and Dalan owned the premises were the proximate cause of the infant plaintiff's injury. Asbestway contends

that there is no scientific or medical evidence showing that the infant plaintiff's elevated blood lead levels was caused by any rebound effect.

DISCUSSION OF LAW

The law is well settled that the proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact and the right to judgment as a matter of law. (*See Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986]). Once the movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence also in admissible form, to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The motion must be decided viewing the facts in the light most favorable to the non-moving party. (*See Mullin v 100 Church Street*, 12 AD3d 263 [1st Dept. 2004]).

"In order to set forth a *prima facie* case of negligence, plaintiff must demonstrate a duty owed by the defendant, a breach of that duty and an injury suffered by the plaintiff which was proximately caused by the breach." (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1980]). Where a child six year of age or under occupies a dwelling unit of a building erected prior to 1960, any peeling paint within the unit is presumed to be a hazardous lead condition (*see*, Administrative Code §27-2013[h][2]). As per Local Law 1, a landlord has constructive notice of "any lead paint hazard within an apartment that the landlord knows is occupied by a child of the specified age." (*Juarez v Wavecrest*, 88 NY2d 628, 647 [1996]). To avoid liability, a landlord must show the "reasonableness of its efforts to remedy the lead condition." (*Id.* at 644)

It is undisputed that the defendants 510 W. 150th and Dalan owed a duty to maintain the premises in a safe condition after the purchase of the building on November 2, 2004. It is also undisputed i) the building was erected prior to 1960; ii) the infant plaintiff was under six years of

age on November 2, 2004; and iii) there were open, uncorrected lead based violations on the premises at the time defendant 510 W. 150th purchased the premises. This Court finds genuine issues of fact as to whether defendants 510 W. 150th and Dalan acted reasonably under the circumstances and/or breached their duty of care to the infant plaintiff. (*Juarez*, 88 NY2d at 644).

The infant plaintiff received chelation therapy for elevated blood lead levels of 20 micrograms/deciliter on July 8, 2004. After chelation therapy, the infant blood lead levels were at 8 micrograms/deciliter on July 16, 2004 but rose to 15 micrograms/deciliter on August 20, 2004 and 18 micrograms/deciliter on September 14, 2004. The infant plaintiff, thereafter, was diagnosed with elevated blood lead levels of 51 micrograms/deciliter on November 12, 2004, and 44 micrograms/deciliter on November 16, 2004, ten (10) and (14) days after defendants 510 W. 150th and Dalan purchased the premises on November 2, 2004.

Dr. Molofsky and Vincent Coluccio causally relate the infant plaintiff's elevated blood lead levels to a rebound effect from the chelation therapy she received on July 8, 2004. Vincent Coluccio further opined that the infant plaintiff was not exposed to lead based paint in the premises after November 2, 2004 because of the certification from the Department of Health and Mental Hygiene stating the abatement was resolved by August 8, 2004.

In opposition, Defendants 506-510's and Proto's expert witness, Arlene Weiss, MS, contends that any purported rebound effect from the chelation therapy the infant plaintiff received on July 8, 2004 would have occurred between two to four weeks after chelation therapy, not four months after chelation was performed.

Based on the record before the Court, there are genuine material issues of fact as to whether defendants 510 W. 150th and Dalan breached their duty of care to the infant plaintiff and whether

their breach was the proximate cause of the infant plaintiff's injuries. The defendants 510 W. 150th and Dalan have failed to meet their *prima facie* burden entitling them to summary judgment.

ACCORDINGLY, based on the record before the Court; a review of the Court file; the applicable law; and due deliberation; it is hereby

ORDERED, that the motion for summary judgment, by the defendants 510 W. 150th and Dalan, is DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 12, 2017
Bronx, New York

HON. DORIS M. GONZALEZ, J. S. C.