

<b>A.F. v Nimat Props., LLC</b>
2017 NY Slip Op 32008(U)
September 11, 2017
Supreme Court, Queens County
Docket Number: 7539/09
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

A.F. an Infant by his Mother and Natural Guardian  
ANINDITA SHABNAM and ANINDITA  
SHABNAM, Individually

Plaintiff,

-against-

NIMAIT PROPERTIES, LLC, NARGIS A. KALAM,  
and MOHAMMED KALAM, RUKHSANA SAMDANI  
NASIR SAMDANI

Defendants.

Index Number: 7539/09

Motion Date: 5/24/17

Motion Seq. No. 4

The following numbered papers 1 to 19 read on this motion by plaintiffs A.F., an infant by his mother and natural guardian, Anindita Shabnam, and Anindita Shabnam, individually (collectively referred to as plaintiffs), for partial summary judgment on the issue of liability against defendants Nimat Properties LLC, Rukhsana Samdani, Nasir Samdani, Nargis A. Kalam and Mohammed Kalam, for an order pursuant to CPLR 3126 (1), resolving in plaintiffs' favor the issue of the multiple dwelling status of a building located at 38-10 65 Street, in the County of Queens, and for an inquest on the issue of damages; by notice of cross motion by defendants Nimat Properties LLC, Rukhsana Samdani and Nasir Samdani (collectively referred to as the Nimat defendants), for summary judgment dismissing plaintiffs' complaint and all cross claims; and by separate notice of cross motion by Nargis A. Kalam and Mohammed Kalam (collectively referred to as the Kalam's) for summary judgment on all causes of action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-5
Notices of Cross Motion - Affidavits - Exhibit.....	6-12
Answering Affidavits - Exhibits .....	13-15
Reply Affidavits .....	16-19

Upon the foregoing papers it is ordered that the motion and cross motions are determined together as follows:

This is an action to recover damages for injuries that plaintiffs allegedly sustained as a result of the infant plaintiff A.F.'s (the infant plaintiff), exposure to a lead-based paint condition and/or ingestion of lead-based paint at two separate and successive residences owned, managed and/or controlled by defendants. The infant plaintiff was born in 2004, and on or about January 15, 2009, he was first diagnosed with elevated blood lead levels. Plaintiffs subsequently commenced this action and have alleged that the first exposure occurred on or around July 2008, through November 2008, while plaintiffs resided at premises located at 35-06 73rd Street, Jackson Heights, in the County of Queens. They have alleged that this exposure occurred within apartment 2A, as well as in common areas of the premises located at 35-06 73rd Street, which was allegedly owned, managed and/or controlled by the Nimat defendants.

Plaintiffs have further alleged that the second exposure occurred while plaintiffs were residing at premises located at 38-10 65th Street, in the County of Queens, which was owned, managed and/or controlled by the Kalam's. In the complaint, plaintiffs have alleged that, as a result of defendants' alleged negligence in maintaining lead-based paint conditions at both premises, which are multiple dwelling buildings that were constructed prior to 1960, the infant plaintiff sustained injuries due to exposure to, and ingestion of that paint. Plaintiff Anindita Shabnam (Shabnam) has also alleged a derivative cause of action sounding in loss of services.

Plaintiffs have moved for partial summary judgment on the issue of liability against all defendants and for an order pursuant to CPLR 3126 (1), resolving in plaintiffs' favor the issue of the multiple dwelling status of a building located at 38-10 65 Street. The Nimat defendants have cross-moved for summary judgment dismissing plaintiffs' complaint and all cross claims, and the Kalam's have cross-moved for summary judgment on all causes of action.

Initially, the branches of plaintiffs' motion that have been made with regard to the Kalam's, and the Kalam's cross motion, have been withdrawn as settled and are, hereby, denied as moot. The court will continue on to address the branches of plaintiffs' motion that have been made with regard to the Nimat defendants and the Nimat defendants' cross motion.

Plaintiffs have moved for partial summary judgment as to the Nimat defendants on the issue of liability, and the Nimat defendants have cross-moved for summary judgment dismissing plaintiffs' complaint and all cross claims. Upon making a motion for summary

judgment, a movant has the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The existence of genuine issues of material fact precludes summary relief (*see id.*).

“Pursuant to Local Law No. 1 (2004) of the City of New York (hereinafter referred to as Local Law 1), the owner of a multiple dwelling must remove or cover paint containing specified hazardous levels of lead in any apartment in which a child six years of age or younger resides” (*Duarte v Community Realty Corp.*, 42 AD3d 480, 481 [2d Dept 2007]; Administrative Code of City of N.Y. former § 27–2013[h], now §§ 27–2056.3, 27–2056.18; *see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]). “Violation of Local Law 1, however, does not result in absolute liability” (*Duarte v Community Realty Corp.*, 42 AD3d at 481; *see Juarez v Wavecrest Mgt. Team*, 88 NY2d at 643). “To impose liability on a landlord for a lead-based paint condition, a 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 remedied” (*Duarte v Community Realty Corp.*, 42 AD3d at 481; *see Juarez v Wavecrest Mgt. Team*, 88 NY2d at 646).

“In multiple dwellings located in the City of New York, constructive notice of a hazardous condition is presumed where the landlord has notice that a child under the age of six resides in the unit” (*Duarte v Community Realty Corp.*, 42 AD3d at 481; *see Juarez v Wavecrest Mgt. Team*, 88 NY2d at 647; *Chadwick v Sabin*, 304 AD2d 603, 603–604 [2d Dept 2003]). Local Law 1 further establishes a rebuttable presumption of a hazardous lead-paint levels in buildings constructed prior to 1960 (*see Roni v Rahim*, 49 AD3d 851, 852 [2d Dept 2008]; *O’Neal v New York City Hous. Auth.*, 4 AD3d 348, 348–49 [2d Dept 2004]; *see also Rent Stabilization Ass’n of N.Y.C., Inc. v Miller*, 15 AD3d 194, 195 [1st Dept 2005]).

In support of this branch of their cross motion, the Nimat defendants have first argued that plaintiffs have no basis to assert liability against Rukhsana Samdani and Nasir Samdani in their individual capacities. However, the Nimat defendants have failed to adequately address their arguments to the individual claim that has been asserted against Rukhsana Samdani and, thus, they are not entitled to the relief sought with regard to any claims asserted against her. Furthermore, the record contains, among other things, the testimony of Nasir Samdani and Rukhsana Samdani, which has demonstrated that issues of fact exist as to whether Nasir Samdani was in exclusive control of the premises located at 35-06 73rd Street, at the time of the alleged exposure (*see Gardner v 1111 Corp.*, 286 AD 110, 112 [1st Dept 1955], *affd*, 1 NY2d 758 [1956]). Therefore, the Nimat defendants are not entitled to the relief sought as to these claims.

In further support of their cross motion, the Nimat defendants have argued that they did not have notice that the infant plaintiff was residing in apartment 2A at 35-06 73rd Street. However, in support of their motion, plaintiffs have argued that the evidence in the record has demonstrated that the Nimat defendants had sufficient notice that the infant plaintiff was residing in apartment 2A, to constitute constructive notice within the purview of Local Law 1.

In addition to the deposition testimony and affidavit of Shabnam, and the testimony of Nasir Samdani and Rukhsana Samdani, the record contains, among other things, non-party Henry Giraldo (Giraldo), and the affidavit and testimony of non-party Kardivel Chamdabaram (Chamdabaram). Shabnam testified and stated in her affidavit that Nasir Samdani was aware that the infant plaintiff was living in apartment 2A in mid-August 2008, and that the building superintendent at the premises repeatedly observed the infant plaintiff entering and exiting the apartment. Shabnam further testified that she did not inform anyone other than Chamdabaram, who rented her a room at the apartment, that she was bringing the infant plaintiff to live at the apartment, and that she did not sign any documents that would indicate to anyone that a child under the age of six would be residing in the apartment.

Giraldo testified that he was the superintendent of the premises located at 35-06 73rd Street, at the time of the alleged exposure and that he never observed a child living in apartment 2A. Nasir Samdani and Rukhsana Samdani both testified that they did not have knowledge that the infant plaintiff was staying in the apartment. The Nimat defendants have also pointed to the affidavit and testimony of Chamdabaram, who stated that he was the tenant of record at apartment 2A at the premises. Chamdabaram further stated that Shabnam temporarily stayed at the apartment for two months without the infant plaintiff, that when Shabnam brought the infant plaintiff to the apartment, the infant plaintiff was only present in the apartment for approximately one week, and that he did not inform the Nimat defendants or Giraldo of Shabnam's presence in the apartment. Plaintiffs have challenged the veracity of Chamdabaram's statements made in his affidavit and, thus, have raised issues as to Chamdabaram's credibility, which are for a jury to decide (*see Wilson v County of Westchester*, 148 AD3d 1091, 1092 [2d Dept 2017]; *Seong Yim Kim v New York City Tr. Auth.*, 87 AD3d 531, 532 [2d Dept 2011]).

Moreover, based upon the above and in light of a myriad of conflicting evidence in the record, it is evident that genuine issues of material fact remain in this matter, at the very least, as to whether the infant plaintiff did, in fact, reside at 35-06 73rd Street, for purposes of the application of Local Law 1, and whether the Nimat defendants had the requisite notice that the infant plaintiff was residing at the premises (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Furthermore, the conflicting statements and conclusions contained in the affidavits of plaintiffs' experts, Edward von Briesen and Martin Rutstein, and the Nimat defendants'

expert, Lee Wasserman, among others, as well as the conflicting evidence presented by the parties' medical experts, have served to demonstrate that genuine issues of material fact also remain as to alleged presence of lead-based paint conditions in apartment 2A at 35-06 73rd Street, and whether plaintiffs' alleged injuries were proximately caused by exposure to lead-based paint conditions at this premises. Therefore, summary relief is precluded at this time and the branch of plaintiffs' motion for partial summary judgment on the issue of liability against the Nimat defendants, as well as the Nimat defendants' cross motion to dismiss all claims and cross claims, are denied.

The Nimat defendants have cross-moved to dismiss plaintiffs' claim sounding in punitive damages, asserted in the complaint. They have argued that the evidence does not demonstrate the clear, unequivocal and convincing level of egregious conduct and moral culpability required for such a claim. In opposition, plaintiffs have sufficiently raised a triable issue of fact. Evidence in the record has demonstrated that an issue of fact exists as to whether the Nimat defendants had notice of the alleged hazardous condition, and the finding of whether the conduct in this matter may be of such a level of culpability that it warrants punitive damages cannot be determined at this juncture (*see Solis-Vicuna v Notias*, 71 AD3d 868, 871 [2d Dept 2010][punitive damages is a question for jury]).

Accordingly, the branches of the motion by plaintiffs for partial summary judgment on the issue of liability against the Kalam's, and for an order resolving in plaintiffs' favor the issue of the multiple dwelling status of a building located at 38-10 65 Street, are denied as moot. The branches of plaintiffs' motion for partial summary judgment on the issue of liability against the Nimat defendants and for an inquest on the issue of damages are denied. The cross motion by the Nimat defendants for summary judgment dismissing plaintiffs' complaint and all cross claims is denied. The cross motion by the the Kalam's for summary judgment on all causes of action is denied as moot.

Dated: September 11, 2017

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J.S.C.