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Outside Counsel

Proving Liability In Lead Poisoning Cases

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Recent decisions by the Court of Appeals and lower courts have clarified the liability of a defendant landowner in a case where a child has suffered injuries due to lead poisoning contracted on the defendant's premises. This article discusses both the liability of the defendant in such a case, and how the plaintiff may discover facts from the defendant to establish this liability.

It is well documented and beyond dispute that lead is a highly toxic metal which, when introduced into the human body, produces a wide range of adverse health effects, especially with regard to children and developing fetuses. ... [T]hese consequences include nervous and reproductive system disorders; delays in neurological and physical development; cognitive and behavioral changes; and hypertension. Most of these physical maladies are irreversible. ... [Y]oung children are more sensitive to lead exposure than adults, particularly their brain and nervous systems, which are especially vulnerable in their developmental stages. Lead exposure as low as two micrograms per deciliter in children under 7 years old lowers IQ, stunts growth and causes behavioral disorders.

Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64, 66 (1st Dept. 1996).

In *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 640-641 (1996), the Court noted that lead-based paint poses a serious health hazard to children, and that high blood lead levels can produce brain damage, coma or death, and even relatively low levels can lead to significant nervous system damage.

Local Law, 1982, No. 1 of the City of New York Sec. 1 (Local Law 1), codified at Administrative Code Sec. 27-2013(h)(2), establishes a presumption that, in any building erected prior to 1960, peeling paint in a dwelling unit occupied by a child six years of age or under comprises a hazardous lead condition. *Juarez v. Wavecrest management Team Ltd.*, 88 N.Y.2d 628, 647 (1996).[1]

The provisions of the Code give the landlord an implicit right of entry to correct hazardous lead conditions and sufficient control to sustain a finding of liability. Id. at 643. Thus, if there is a peeling paint condition in an apartment inhabited by a child of six or under in a building constructed prior to 1960, there is a rebuttable presumption of liability against the landlord that the landlord can only rebut by showing that lead paint hazard exited despite his diligent and reasonable efforts to prevent it. Id. at 644. See, *Woolfalk v. N.Y.C.H.A.*, 263 A.D.2d 355, 356 (1st Dept. 1999); *Velez v. Stopanjac*, 273 A.D.2d 22 (1st Dept. 2000).

Local Law 1 applies to any building built before 1960, whether or not such building was a multiple dwelling on Jan. 1, 1960, where it was converted from a private dwelling to a multiple dwelling after that date. *Morales v. Reyes*, 187 Misc. 2d 390, 393 (Sup. Kings 2001).

Once the defendant has constructive or presumed notice of a lead paint condition in an apartment, it is obligated to remedy it prior to receiving any notice from the Department of Health and prior to the lead-paint poisoning of the infant plaintiff. Any abatement efforts that occur subsequent to the lead-paint poisoning are insufficient for a defendant to avoid liability. Any other interpretation of Local Law 1 renders its abatement provisions meaningless. *Allison v. Bay Realty Corp.*, 172 Misc. 2d 480, 485 (Sup. Queens, 1997).

Notice of the condition continues until the hazard is abated and runs to any affected child. *Baptiste v. N.Y.C.H.A.*, 177 Misc. 2d 51, 54 (Sup. Kings, 1998). Negligent abatement of the lead may also be actionable. *Valerio v. City of New York*, 187 Misc. 2d 867, 870 (Sup. NY 2000); *Valdez v. MGS Realty and Management Corp.*, 2000 WL 511024 at 10-11 (S.D.N.Y.).

The alleged failure of the lead poisoned child's parents to keep their apartment clean and sanitary, prevent Code violations or promptly obtain medical care for the child, is non-actionable. *Fontanez v. Libra*, 730 Co., 256 A.D.2d 125 (1st Dept. 1998).

In *Chapman v. Silber*, 2001 NY Slip Op. 09092, 2001 WL 1426665 (Nov. 15, 2001), the Court of Appeals held that a landlord who actually knows of the existence of many conditions indicating a lead paint hazardous to young children may, in the minds of the jury, also be charged constructively with notice of the hazard. Thus, a landlord aware of the age of the building, the presence of chipped and peeling paint, the dangers of lead paint to children, and the presence of young children in the apartment may have an obligation to take precautions to provide a reasonably safe environment for plaintiffs. The Court's holding also applies to non-multiple dwellings in the City of New York. *Bellony v. Siegel*, 288 A.D.2d 411, 732 N.Y.S.2d 647 (2nd Dept. 2001).

Discovery Rules

The Court of Appeals has clearly held that the CPLR permits disclosure of [A]ny facts bearing on the controversy which will assist preparation for trial.... *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968).

In that seminal case, the Court held that if there is any possibility that the information is sought in good faith for possible use as evidence-in chief, in rebuttal or for cross-examination, it should be considered evidence material. Id. At 407. Pre-trial disclosure extends not only to admissible proof, but also to testimony or documents which may lead to the disclosure of admissible proof. *Fell v. Presbyterian Hosp.*, 98 A.D.2d 624, 625 (1st Dept. 1983). See, CPLR 3101(a).

The party opposing disclosures bears the burden of showing immunity from disclosure. *Koump v. Smith*, 25 N.Y.2d 287, 294 (1969). Unsubstantiated conclusory allegations of hardship or an unwarranted fishing expedition are insufficient to

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bar disclosure. The opponent must show undue prejudice, disadvantage or embarrassment. *Cynthia B. v. New Rochelle Hosp. Med. Center*, 60 N.Y. 2d, 452, 463 (1983); *People v. Skylift*, 72 A.D.2d 599 (2nd. Dept. 1979). The fact that the Defendant may have to produce or look for a number of documents is irrelevant and not determinative. *Shapiro v. Fine*, 95 A.D.2d 714 (1st. Dept. 1983).

Arbitrary cut-off periods are unwarranted. *DeOlden v. State*, 107 A.D.2d 790 (2nd. Dept. 1985). In slip and fall cases, disclosure of all records for a five year period is proper. *Boone v. Supermarket General Corp.*, 109 A.D.2d 771 (2nd. Dept. 1985).

In *Giacaone v. Hicksville Concrete Corp.*, 134 A.D.2d 482 (2nd Dept. 1987), the Court permitted discovery of maintenance records for a period of 12 years preceding the plaintiff's accident. In *Taylor v. John Doe*, 167 A.D.2d 984 (4th. Dept. 1990), the court allowed discovery from the date of construction through the accident. In *Parry v. Pyramid Crossgattes Co.*, 158 A.D.2d 787 (3d Dept. 1990), in a case involving escalators, the Court ordered production of records for a 15-year period, from District Offices Statewide. In *Caldwell v. 302 Convent Avenue Housing Development Fund Corp.*, 272 A.D.2d 112, 114 (1st Dept. 2000), the court held that [A]s a matter of law, 13 years is more that a reasonable period in which to discover and remedy the hazard represented by the presence of lead paint.

Plaintiff is entitled to records concerning prior similar incidents, complaints, maintenance, inspection, and repair, etc., that would show notice and existence of a dangerous condition. *Dattmore v. Eagan Real Estate, Inc.*, 112 A.D.2d 800 (4th. Dept. 1985); *Klatz v. Armor Elevator Co., Inc.*, 93 A.D.2d 633 (2d Dept. 1983); *Indilicato v. Pacific Pool Indus., Inc.*, 95 A.D.2d 886 (3rd. Dept. 1983); *Hammond v. Int'l Paper Co.*, 178 A.D.2d 798, 799 (3rd Dept. 1991); *Alexson Mechanical Contracting, Inc. v. Honeywell*, 101 A.D.2d 796 (2nd Dept 1984); *Coan v. Long Island Rail Road*, 246 A.D.2d 569 (2nd Dept. 1998).

Plaintiff is clearly entitled to records of inspection, maintenance and repairs. See, *Ragona v. Alexander's Rent-A-Car Inc.*, 36 A.D.2d 971 (2nd Dept. 1971); *Dattmore v. Eagan Real Estate, Inc.*, 112 A.D.2d 800 (4th Dept. 1985)(maintenance, log books and records of prior accidents discoverable); *Villa v. N.Y.C.H.A.*, 107 A.D.2d 614 (1st. Dept. 1985); *Petty v. Riverbay Corp.*, 92 A.D.2d 525 (1st. Dept. 1983).

In *McKeon v. Sear, Roebuck and Co.*, 190 A.D.2d 577 (1st. Dept. 1993), the Appellate Division, First Department, compelled disclosure of prior accidents, complaints and lawsuits involving various other models of products that were substantially similar to the product in issue, and did not limit the disclosure to accidents that were the same as the plaintiffs.

With respect to other lawsuits, the courts have allowed discovery of the captions, index numbers, names of attorneys, deposition and trial transcripts. *Mott v. Chesebro-Whitman Company*, 87 A.D.2d 573 (2nd Dept. 1982); *Ielovich v. Taylor Mach. Works, Inc.*, 128 A.D.2d 676 (2nd Dept. 1987); *Peluso v. Rochester Gen'l Hosp.*, 64 A.D.2d 1013 (4th Dept. 1978); *Johantgen v. Hobart Mfg. Co.*, 64 A.D.2d 858 (4th Dept. 1978); *Brown v. AMF Inc.*, 124 Misc. 2d 964 (Sup. Nassau, 1984); *Francione v. Birnbaum*, 134 A.D.2d 850, mot. rearg. or lv. to app. den., A.D.2d , 525 N.Y.S.2d 167 (4th Dept. 1988).

In *Harmon v. Ford Motor Co.*, 89 A.D.2d 800 (4th Dept. 1982), the court allowed discovery of studies and tests. See, *Feinman v. Menachemi*, 98 Misc. 2d 740, aff'd, 75 A.D.2d 838 (2nd Dept. 1980). See also, *Bikowicz v. Nedco Pharmacy, Inc.*, 100 A.D.2d 702 (3rd Dept. 1984)(reports of investigations, research, testing, instructions and brochures discoverable); *Bilhorn v. Lipman*, 66 A.D.2d 1030 (4th Dept. 1978) (transcript of meeting 15 years before accident relevant to knowledge of dangerousness).

There is no restrictive rule limiting discovery to the specific building or exact location where an accident happened. *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 294 (1993)(same housing complex). In *Petty v. Riverbay Corp.*, 92 A.D.2d 525 (1st Dept. 1983), the Court ordered discovery for an entire building and two adjacent buildings for a period of three years prior to an incident in order to obtain records concerning notice for an assault in an elevator. In *Dukes v. 800 Grand Concourse Owners, Inc.*, 198 A.D.2d 13 (1st Dept. 1993), proof of roof leakage from other units in the building provided notice.

Establishing Notice

In *Smith v. Fields, N.Y.L.J.* June 12, 1997, P. 28, Col. 6 (Sup. New York), the court held that evidence of unsatisfactory levels of leadin paint on surfaces, leading to earlier violations in other units in the same building, is admissible for purposes of establishing notice of potentially dangerous conditions.

In *Smith*, supra, the defendant argued that since the other rooms in the building had a different paint history from plaintiff's, the conditions were not similar, and that under these circumstances, the prejudicial effect of the evidence of the violations and conditions in the other units outweighed any probative value. The court squarely rejected these claims and held that ... the fact finders should be able to consider the landlord's actions in dealing with the hazard of lead paint in the building at large, it is relevant for the jury to hear about other conditions in that building, to the extent the landlord had knowledge of them. The court found that evidence regarding violations for similar conditions near the time of this violation is ... relevant ... on the issue of the information the landlord had at his disposal which motivated him to act in a particular manner. In other words, it is relevant to the exercise of due care with regard to similarly situated tenants.

In *Rodriguez v. Amigo*, 244 A.D.2d 323 (2nd Dept. 1997), the Appellate court held that there is a question of fact as to whether the defendants Amigo and Friendly had constructive notice in November 1992 of a lead condition in the plaintiffs' apartment, because they had actual notice of a lead condition in another apartment in the same building. Id. at 324. Evidence of the condition in the other apartment would be admissible at trial. Id. at 325.

The court noted the long and well established principle of law that [K]nowledge of a dangerous condition in one portion of the structure may have imposed upon the owners an obligation to examine other portions of the structure for defects arising from the same cause, and to ascertain what was ascertainable with the exercise of reasonable care. Id.

Thus, despite the fact that the infant plaintiff's mother never complained to any of the defendants about chipping or peeling paint, and an engineering inspection commissioned by the current owner before purchasing the property did not reveal any peeling paint on interior walls, or any lead condition, because the defendant was notified about the presence of a lead condition in another apartment in the building, a question of fact was presented with respect to the defendant's liability for the infant plaintiff's elevated lead condition.

In *Espinal v. 570 W. 156th Associates*, 174 Misc. 2d 860, aff'd, 258 A.D.2d 309 (1st Dept. 1999), the court found that notice of a lead paint hazard in one classroom in a building provided notice of a similar condition in a different classroom, and was relevant in considering the reasonableness of the defendant's conduct.

The Appellate Court specifically held that [A]n issue of fact exists as to whether defendant, aware of peeling paint in its building constructed before 1960, could reasonably have foreseen danger to children using the building. 258 A.D.2d at 310. While the prohibition against lead paint in day care centers was not in effect during the period of plaintiff's alleged exposure, its prohibition in dwellings had been in effect since 1960. Id.

(1) In 1999, the lead paint provisions of Local Law 1 were modified and placed in a new section, known as Local Law 38, NYC Administrative Code Sec. 27-2056.1, et seq. These modifications were nullified in *New York City Coalition to End Lead Poisoning, Inc., v. Vallone*, N.Y.L.J. Oct. 16, 2000, P. 26, Col. 1 (Sup. NY). The Order nullifying the changes is on appeal.