SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 32

KENYATTA SPELLMAN, an infant under the age of 14 years, by his mother and natural guardian, PATRICIA BLOUNT and PATRICIA BLOUNT, Plaintiffs - against – TREA ESTATES AND ENTERPRISES, INC., and LEMOR REALTY CORP., Defendants	Index No. 30533/92

CAROL E. HUFF, J.

This action was brought by plaintiff Patricia Blount on behalf of her son, Kenyatta Spellman, an infant who sustained personal injuries, as a result of his alleged ingestion of lead based paint chips in their apartment, 4D, located at 138 East 133rd Street, New York, New York.

Defendant Lemor Realty Corp., s/h/a “Lemor Realty Corp.” (“Lemor”), the managing agent, moves, pursuant to CPLR 3212, for summary judgment and to dismiss the complaint and all cross claims asserted against it on the grounds that it did not create the lead paint condition which allegedly caused Kenyatta’s injuries, and because it did not have exclusive and complete control of the maintenance and operation of the premises.

Lemor also asks this Court to direct the clerk to enter judgment severing and dismissing each claim against movant and to vacate plaintiff’s note of issue and certificate of readiness for trial because the need for discovery remains.

Defendant Trea Estates and Enterprises, Inc. (“Trea Estates”), the building’s owner, opposes this motion on the grounds that Lemor had complete and exclusive control over the maintenance and operation of the building.

Plaintiffs also oppose the motion and maintain that the paint had been

peeling from the walls of apartment 4D since Ms. Blount commenced her tenancy in 1986. This condition allegedly remained unabated through the date of Kenyatta's birth on December 23, 1988 and up to the time that plaintiffs ultimately vacated the apartment in December 1992.

On September 4, 1992, Kenyatta was tested and was found to have an elevated lead level of 25 mcg./dl. Shortly after the diagnosis of lead poisoning, the City of New York's Department of Health ("DOH") inspected the premises and conducted a procedure known as "XRF testing". As a result of this test, DOH found five positive lead readings and served on Lemor an "Order to Abate Nuisance", dated October 6, 1992. DOH then reinspected the apartment on November 13, 1992, finding that only one of the cited violations concerning "wall #2" in the bathroom was removed. The remaining four violations were not corrected.

Dr. Gloria E.A. Toote, the principal of Trea Estates, maintains that she hired Lemor prior to June 1, 1992 to serve as managing agent for the subject building and for several other buildings owned by Trea Estates. Although there was no written management agreement between Trea Estates and Lemor, Dr. Toote avers that the parties orally agreed that Lemor would have complete and exclusive control over the management and operation for the building. According to Dr. Toote, Lemor had total discretion over managerial and operational decisions of the building except for the selection of attorneys to represent Trea Estates in any legal or administrative proceedings. Dr. Toote contends that Trea Estates was not involved in the day—to—day operations or management of the building, but received monthly fiscal reports. Furthermore, Dr. Toote stated:

> Concomitant with this arrangement, Lemor handled all of the management functions and operations of the building including, but not limited to, seeing that the building was properly maintained and repaired, renting vacant apartments, collecting

> and depositing rents, handling all tenant complaints, and hiring personnel to maintain and operate the building. Lemor was responsible for any painting and plastering that needed to be performed in the building and for handling and complying with any complaints, violations, directives or notices concerning the condition of the building.

Dr. Toote also maintained that, although Lemor was required to gather bids for any contracts over a certain amount of money, Lemor had ultimate responsibility for the property and could expend money to maintain and operate the building.

In addition, Dr. Toote stated that she specifically instructed Lemor to inspect the building to determine if any apartments needed to be painted and then to have those apartments painted. Lemor allegedly had access to Trea Estates's account with the Amsterdam Paint Company and was given blank checks to be used to purchase paint. Dr. Toote also states that all tenants were informed to contact Lemor with any complaints or repair requests (id. ¶ 12).

Lemor maintains that it had no involvement with the building prior to June 1, 1992. Lemor also contends that it did not have exclusive control since the management agreement required Lemor to obtain the prior approval of Dr. Toote before spending more than a threshold amount on non—emergency disbursements. For those expenditures requiring pre—approval, Trea Estates was obligated to gather bids from selected contractors and submit these bids to Dr. Toote for her decision. In addition, the principal shareholder of Lemor, Kenneth Morrison, testified that Dr. Toote decided when an apartment would be painted and hired a superintendent, Jeffrey Seymour, to paint the apartments. In further support of its assertion that Seymour was an employee of Trea Estates, Lemor submits a copy of a decision from the Workers' Compensation Board, dated June 4, 1996, which expressly found that Seymour was employed by Trea Estates.

In order to obtain summary judgment, Lemor must establish its defense sufficiently to warrant the court as a matter of law to direct judgment in its favor (Zuckerman v City of New York, 49 NY2d 557, 562). To defeat a motion for summary judgment the opposing parties must show that there are sufficient facts to require a trial (id). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (id.)

The duty to remove lead paint from residential buildings is governed by both State and local law. In New York, the Multiple Dwelling Law specifically "directs that [e]very multiple dwelling * * * and every part thereof and the lot upon which it is situated, shall be kept in good repair" (Juarez v Wavecrest Mgt. Team Ltd., 88 NY2d 628, 643, quoting Multiple Dwelling Law § 78[1]).

In New York City, landlords are charged "with the responsibility for safe maintenance of their buildings and facilities" (Juarez v Wavecrest Mgt. Team Ltd., supra, 88 NY2d, at 643, citing the Administrative Code of City of NY §S 27—127 and 27- 128 maintenance obligations, Local Law 1, which is codified in Administrative Code § 27-2013(h), "imposes a specific duty to ameliorate hazardous levels of lead—based paint" (Juarez v Wavecrest Mgt. Team Ltd., supra, 88 NY2d, at 643).

With respect to the question of Lemor's direct liability to plaintiffs, New York law generally recognizes that "an agent is liable to third persons only for affirmative acts of negligence" (Lennon v Oakhurst Gardens Corp., 229 AD2d 897, 898). In this instance, Lemor may not avoid liability to plaintiff based solely on the fact that it was not the owner of the building. The nondelegable duty imposed under section 78 of the Multiple Dwelling Law is not limited, as a matter of law, to titleholders (Nwaru v Leeds Mgt. Co.,____AD2d____,____, 654 NYS2d 338, 339). However, as managing agent, Lemor is only "subject to liability for nonfeasance where it has complete and exclusive control of the management and operation of the building" (Lennon v

Oakhurst Gardens Corp., supra, 229 AD2d, at 898; Gardner v 1111 Corp., 286 App Div 110, 112, affd 1 NY2d 758).

In order to ascertain the scope of a managing agent's duties, the Court first looks to the actual rights and duties conferred by the contract document (Mann Theatres Corp. of California v Mid-Island Shopping Plaza, 94 AD2d 466, 472, affd 62 NY2d 930). Defendants' agreement was never in writing so that the Court must analyze the day—to—day workings of the arrangement.

Trea Estates' contention that it did not exercise any control over the building is without merit. The present submissions do not indicate that Trea Estates parted with possession of building. The oral contract was clearly a management agreement and not an assignment; Trea Estates had a right to monthly reports. Lemor only received a six percent commission on rents (see, Toote EBT 9/24/96, at 34; cf., Mann Theatres Corp. of California v Mid—Island Shopping Plaza Co., supra, 94 AD2d, at 471.

The record also suggests that Lemor had pervasive control over most ordinary repairs, but that certain costly expenditures were subject to Dr. Toote's prior approval. In addition, Dr. Toote admits that she selected the painting company and paid by check. Lemor's need to obtain prior approval and to use the contractors chosen by the owner are not consistent with exclusive management and indicate that Trea Estates retained control under the management agreement and, hence, had the ultimate obligation for inspecting and repairing the premises (Lennon v Oakhurst Gardens Corp., supra, 229 AD2d, at 899, citing Gardner v 1111 Corp., supra, 286 App Div, at 113; Ioannidoru v Kingswood Mgt. Corp., 203 AD2d 248; cf, Nwaru v Leeds Mgt. Co., supra, ____AD2d, at____, 654 NYS2d, at 339). Therefore, that branch of defendant Lemor's motion for summary judgment on the complaint is granted.

Turning to Trea Estates' cross claim for indemnification, the fact that Lemor did not expressly agree to indemnify Trea Estates in the event of a lawsuit is not dispositive. In this instance, Lemor admits that it agreed

to repair and maintain the building. “As between the owner and one voluntarily undertaking responsibility for maintenance, however, the party assuming the contractual duty is liable to the owner for the damages the owner must pay” (Mas v Two Bridges Assocs., supra, 75 NY2d, at 687—688). However, there is still an unresolved issue as to whether or not Lemor specifically agreed to inspect the building for peeling paint and to correct all lead paint violations for Trea Estates. If the evidence shows that Lemor entered into such a contract, then Trea Estates is entitled to rely on Lemor’s promise and seek from Lemor reimbursement for any award of damages to plaintiffs under the theory of implied indemnity (see, Mas v Two Bridges Assocs., supra, 75 NY2d, at 691). Therefore, that branch of Lemor’s motion for summary judgment to dismiss Trea Estates’ first cross claim for indemnity must be denied at this juncture.

However, Trea Estates’ second cross—claim must be severed and dismissed pursuant to CPLR 1602(2) (iv) which prohibits contribution where the liability arises from “non-delegable duty”. Since owners are charged with a nondelegable duty to keep dwellings in good repair and to remove or cover lead paint, Trea Estates may not take advantage of the right to contribution found in CPLR 1601 (Nwaru v Leeds Mgt. Co., supra, ____AD2d, at____, 654 NYS2d, at 339, citing Cortes v Riverbridge Realty Co., 227 AD2d 430).

As for the remaining branch of Lemor’s motion, plaintiffs maintain that a note of issue was never filed with the Court. Since Lemor fails to submit a copy of the purported notice of issue or the certificate of readiness, that branch of Lemor’s motion to strike is denied.

Accordingly, it is

ORDERED that the branch of defendant Lemor’s motion for summary judgment on the complaint is granted and all claims raised by plaintiffs

against Lemor are, hereby severed and dismissed; it is further

ORDERED that the branch of defendant Lemor's motion for summary judgment is granted as to Trea Estates's second cross claim for contribution which is, hereby, severed and dismissed; it is further

ORDERED that the clerk is to enter judgment accordingly.

Dated: **SEP 24 1997**

J.S.C.

CAROL E. HUFF