ENVIRONMENTAL CLAIMS JOURNAL
2017, VOL. 29, NO. 2, 150–158
http://dx.doi.org/10.1080/10406026.2017.1307010

Routledge
Taylor & Francis Group

New York Lead-Paint Case Update

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ABSTRACT
The contaminated water supply in Flint, Michigan, highlighted lead issues in a relatively new context: drinking water. Lead-paint lawsuits, however, have filled court calendars for many years in many jurisdictions. This article examines a variety of recent lead-paint decisions issued by courts in New York—from trial level, to appellate, to the state's highest court, the New York Court of Appeals. As these cases suggest, lead-paint complaints against landlords and property owners are likely to continue to be filed in New York courts for quite some time to come.

No lead-paint liability for landlord of apartment where child spent fifty hours per week but in which she did not reside, New York's top court rules

The plaintiff in this case, Yaniveth R., was born in January 1997. She lived with her father and mother, Ramona S., in an apartment in the Bronx from early 1997 until 2002. Yaniveth's paternal grandmother lived nearby on the first floor of an apartment building owned by LTD Realty Company and LTD Realty Company LLC.

When Yaniveth was three months old, her grandmother began watching her five days a week at her apartment, from approximately 9:30 a.m. until 6:30 or 7:00 p.m., while Yaniveth's parents were at work. Yaniveth returned to her parents' apartment each evening, where she lived with her mother, father, and older sister.

According to both Ramona and Yaniveth's grandmother, Yaniveth did not live with the grandmother—she lived only at her parents' apartment.

In January 1998, Yaniveth was found to have an elevated blood lead level. The New York City Department of Health identified hazardous lead-paint conditions at the grandmother's apartment and issued LTD Realty an order to abate.

In 2006 Ramona filed a negligence action against LTD Realty alleging that, because Yaniveth had "spent a significant amount of time" in her grandmother's apartment, LTD Realty owed her a duty to abate the apartment of hazardous lead conditions pursuant to the lead abatement legislation in effect in New York City during her exposure. That law, Local Law 1, set forth in the administrative code as section 27–2013(h), imposed a duty on landlords to remove lead-based paint in any dwelling unit in which a child six years of age and under resided.

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LTD Realty moved for summary judgment, arguing that they owed no duty under the law to remove lead-based paint from the grandmother's apartment because Yaniveth did not "reside" there. In the absence of a duty, LTD Realty argued, there could be no negligence.

The trial court granted LTD Realty's motion and dismissed the complaint. An intermediate appellate court unanimously affirmed, and the case reached New York's highest court, the New York Court of Appeals.

The Court of Appeals decision

The New York Court of Appeals affirmed.

In its decision, the court explained that the appeal turned on the meaning of the word *reside* in the New York City law. The court noted that the law did not define the term.

The court turned to dictionaries from the relevant time period, noting that they defined *reside* as "to dwell permanently or continuously: occupy a place as one's legal domicile" and "to have a settled abode for a time; have one's residence or domicile."

According to the court, residence meant "*living in* a particular locality," even if the person did not intend to make that place a "fixed and permanent home." It required "something more than temporary or physical presence," with some "degree of permanence and an intention to remain," the court added.

The court found nothing in the law's legislative history suggesting that the New York City Council had meant anything other than this understanding of the term *reside*.

The court said that it agreed with the lower courts that Yaniveth did not *reside* in her grandmother's apartment. It concluded that spending fifty hours per week in an apartment with a noncustodial caregiver was "insufficient to impose liability on a landlord" under the New York City law.

The case is *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186 (2016).

Rivkin Radler comment. What we can see from this case is the focus on notice coming from the lease and other documents executed and/or exchanged between a landlord and his or her tenant. The courts are not willing to make a leap to find notice of *residency* based solely on the frequency a person is in a specific building or apartment. That would clearly create too high a burden for defendant landowners.

Appeals court reinstates lead paint-related negligence action against apartment owner

The plaintiffs in this case sought damages for injuries they allegedly sustained as a result of their exposure to lead paint as children. The plaintiffs alleged that their exposure had occurred when they had resided in various apartments rented by their mother, including in one apartment owned by Catherine M. Pirillo. The plaintiffs contended that Pirillo had been negligent in her ownership and maintenance of the apartment and that she also had been negligent in her abatement of the lead-paint hazard.

The trial court granted Pirillo's motion for summary judgment, and the plaintiffs appealed.

The appellate court's decision

The appellate court reversed.

In its decision, the appellate court observed that New York State has not enacted legislation imposing a duty on landlords to test for or abate lead-based paint hazards (as opposed to the specific statutory framework in New York City). Therefore, it continued, a landlord's liability for such a condition would be based on traditional common law principles. The appellate court explained that this meant that:

> [A] landlord may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs.

Put another way, the appellate court continued, a plaintiff must demonstrate that the landlord had "actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition."

The appellate court pointed out that, in moving for summary judgment, Pirillo had contended that there was no evidence of a hazardous condition in the apartment; that, even if such a condition had existed, she had lacked notice of it; and that any exposure to that condition in her apartment had not been a cause of the injuries claimed by the plaintiffs.

The appellate court found "no dispute that the existence of chipping and peeling lead-based paint" was, in fact, a "hazardous condition" inasmuch as "[t]he serious health hazard posed to children by exposure to lead-based paint is by now well established."

The appellate court then decided that Pirillo had failed to meet her burden on her motion for summary judgment of establishing as a matter of law that a hazardous condition had not existed in the apartment. Simply put, the appellate court found, Pirillo had not established "the absence of a lead paint condition at the residence."

Moreover, the appellate court continued, Pirillo had not met "her burden" of establishing that she had lacked either actual or constructive notice of the condition. The appellate court noted that although Pirillo had denied knowing that there was lead paint in the apartment, she had admitted receiving some documents from the local county health department indicating the presence of lead paint at that apartment. The appellate court ruled that, even assuming that her admission was insufficient to establish actual notice, she had "failed to establish as a matter of law that she lacked constructive notice of the condition."

It noted that Pirillo:

- had retained a right of entry and had assumed a duty to make repairs;
- had known that the residence had been constructed before lead-based paint had been banned; and
- had known that young children lived in the apartment.

According to the appellate court, the plaintiffs had raised a triable issue of fact by submitting "evidence from which a jury could infer that [Pirillo] knew or should have known of the dangers of lead paint to children."

The appellate court also found that the plaintiffs had raised triable issues of fact on causation by submitting an affirmation from a medical expert opining that the cause of the plaintiffs' injuries was their "significant" exposure to lead. The appellate court ruled, therefore, that there were triable issues of fact whether plaintiffs' "cognitive and behavioral difficulties were caused by [their] exposure to lead-based paint while [they] lived in [Pirillo's] apartment."

Finally, the appellate court ruled that the trial court also had erred in dismissing the plaintiffs' negligent abatement cause of action, concluding that Pirillo had failed to establish as a matter of law that she had performed the abatement in a reasonable manner and within a reasonable time after learning that there was lead paint in the apartment.

The case is *Rodrigues v. Lesser*, 136 A.D.3d 1322 (4th Dep't 2016).

Plaintiff's failure to demonstrate that defendants had increased his injuries doomed his lead-paint claim, First Department decides

Two brothers and their sister filed a lawsuit alleging that they had been injured by exposure to lead paint at various apartments they had resided in and had visited during their childhoods.

Included in the plaintiffs' claims was apartment #1 located at 4464 Park Avenue in the Bronx, New York, where the infant plaintiffs' aunt resided with their two cousins, who were under the age of seven.

4464 Park Avenue LLC and Finger Management Corporation moved for summary judgment dismissing the complaint against them, arguing that the infant plaintiffs had not resided in the apartment and that their injuries had been sustained before 4464 Park and Finger Management had taken over the building.

The plaintiffs opposed the motion, arguing that the defendants had actual notice of the lead paint based on the fact that their two cousins under the age of seven resided there and based on lead-paint violations issued by New York City's Department of Housing Preservation and Development.

The trial court granted the summary judgment motion as to two of the plaintiffs, finding that they did not have elevated blood lead levels after the defendants had taken over management of the apartment, but denied it as to the third plaintiff, finding that issues of fact existed concerning his elevated blood lead levels and his potential exposure at the defendants' property.

The defendants appealed, arguing that their motion for summary judgment should have been granted as to all three plaintiffs.

The appellate court's decision

The appellate court reversed.

In its decision, the appellate court found that the defendants had established their prima facie entitlement to summary judgment by submitting evidence that they had

not owned or managed the building until the time the third plaintiff was approximately twelve years old.

The appellate court added that the third plaintiff had failed to raise a triable issue of fact concerning how his existing injuries when the defendants took ownership and management of the building had been made significantly worse during their tenure.

Accordingly, it concluded, the defendants were entitled to summary judgment on the third plaintiff's claim.

The case is *Arelie F. v. Cathedral Properties, LLC*, 140 A.D.3d 496 (1st Dep't 2016).

Mortgagee bank could not be held liable for plaintiff's alleged lead-paint injuries, Fourth Department rules

The plaintiff in this case filed a lawsuit alleging that she had been injured due to her exposure to lead paint through March 1993 in premises on which M & T Bank held a mortgage.

The bank moved for summary judgment dismissing the complaint against it, contending that it had not become owner of the premises where the exposure allegedly had occurred until April 1993, after the period of alleged exposure and that it had owed no duty to the plaintiff as an out-of-possession mortgagee during the period of exposure.

The trial court granted the bank's motion, and the plaintiff appealed.

The appellate court's decision

The appellate court affirmed.

In its decision, the appellate court found that the record was "clear" that the bank had not become the owner of the premises until a foreclosure sale on April 5, 1993, which had occurred after the period in which the plaintiff allegedly had been exposed to lead paint on the premises.

Therefore, the appellate court ruled, the bank was not liable for the plaintiff's alleged injuries.

The appellate court rejected the plaintiff's contention that the referee appointed by the court in the foreclosure action was an agent of the bank, and that the authority and actions or inactions of the referee, therefore, could be attributed to the bank. The appellate court explained that it was "well settled" that a receiver was "an officer of the court and not an agent of the mortgagee or the owner."

The case is *Peoples v. M&T Bank*, 140 A.D.3d 1741 (4th Dep't 2016).

Finding issues of fact as to landlord's constructive notice of alleged lead-paint condition, New York trial court denies his summary judgment motion

The infant plaintiff in this case sought to recover for personal injuries she allegedly had sustained as a result of lead poisoning while she was a tenant at the premises located at 12 Union Avenue in Patchogue, New York. The plaintiff alleged that the

defendants were negligent in, among other things, causing or permitting a dangerous and toxic condition to exist at the premises.

Francis Pelkowski moved for summary judgment in his favor dismissing the complaint.

The court's decision

The court denied Pelkowski's motion.

In its decision, the court explained that, using a generally applicable negligence analysis, for a landlord to be held liable for injuries resulting from a defective condition upon the premises, a plaintiff had to 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 corrected.

Here, the court decided, Pelkowski had demonstrated, through his own testimony, that he had not created the allegedly defective condition. Moreover, the court continued, he had testified that he had never received notice of any peeling or chipped paint, thus denying actual notice of the alleged condition.

The court pointed out that, with respect to constructive notice, Pelkowski had admitted that he had retained a right of reentry to the premises and had a duty to make repairs. The court added that he also had admitted that he had been aware that young children were residing in the premises.

The court then rejected Pelkowski's contention that, nevertheless, he was entitled to summary judgment in his favor because he did "not recall" knowing when the premises were constructed and, as a result, that the plaintiff could not establish that he had known that the house had been constructed at a time before lead-based paint had been banned.

Lead-based paint was banned for residential use in the United States in 1978 by the U.S. Product Safety Commission, the court pointed out. Given that the plaintiff had provided a certified copy of a certificate of existing use dated May 25, 1977, for the two-family home, it was clear that it was built at least prior to 1977, the court said.

Although Pelkowski did "not recall" when the home was built, the court observed that an individual or entity purchasing rental property was presumed to acquire sufficient documentation and knowledge as to the age of the property.

Finally, the court was not persuaded by Pelkowski's denial of knowledge that lead-based paint was hazardous to children. According to the court, the plaintiff had established that, pursuant to the Federal Toxic Substances Control Act, as a lessor of housing built before 1978, Pelkowski was required to provide lessees with written information about the danger of lead to young children with all initial leases and, if not already provided, with subsequent renewal leases. The court ruled that, as a landlord, Pelkowski should have been aware of these federal requirements. Moreover, the court said, his denial of such knowledge was "belied by the fact that the subject property was transferred many times, insured, financed, and refinanced and both lenders and insurers would have made defendant, a college professor at New York Maritime Academy, and attorney, aware of the risks of lead-based paint."

Accordingly, the court concluded, because factual issues existed as to Pelkowski's constructive knowledge of the alleged dangerous condition, Pelkowski was not entitled to summary judgment in his favor.

The case is *Alston v. Pelkowski*, 2016 N.Y. Slip Op. 31855(U) (Sup.Ct. Suffolk Co. July 18, 2016).

Lead-paint suit against landlords is dismissed in absence of evidence they owned property when infant plaintiffs had resided there

In their action alleging injury caused by lead-paint poisoning, the plaintiffs in this case claimed that the infant plaintiffs had been exposed to lead-based paint in three apartments, including #2E in a ten-unit prewar multiple dwelling building known as 171 East 102 Street in Manhattan.

The defendants moved for summary judgment.

The court's decision

The court granted summary judgment in favor of the defendants.

It first ruled that the complaint as against defendants Prime Realty Services, Richard Aidekman, Robert Kligerman, Prime Realty Service, Inc., Arthur Green s/h/a Andrew Green, and Multi-Dwelling Properties IV LLC had to be dismissed because it was undisputed that during the relevant time period—July 30, 1999, through September 30, 2003—the unit and building were owned by Prime Residential Manhattan R & R 1 LLC.

The court then ruled that the complaint against Prime Residential also had to be dismissed because it was undisputed that none of the children had resided in the apartment when Prime Residential had owned the unit, and there was no evidence that Prime Residential had actual notice that a child under the age of seven was residing in the apartment.

The case is *Arelie F. v. Cathedral Properties, LLC*, 2017 N.Y. Slip Op. 00585 (1st Dep't Jan. 31, 2017).

Appellate court reverses lead-paint award against property owner and title company

On August 13, 2012, Xiaomao Wang and Alberto Martinez executed a contract for the sale to Wang of a two-family residential premises with a closing date of December 28, 2012. The contract required compliance with notices of violations of law "issued as of the date hereof" and the disclosure of lead-based paint conditions, if known, and also provided for a ten-day period for the purchaser "to conduct a risk assessment or inspection for the presence of lead-based paint hazards."

At that time, or shortly thereafter, Wang's counsel hired Bruce A. Payne Associates, Inc., a title abstract company, to investigate, among other things, violation notices "recorded in the Public Records."

Wang failed to exercise his right to conduct a lead-paint investigation, and never requested that Bruce A. Payne Associates, Inc., do so.

On November 29, 2012, the New York City Department of Health and Mental Hygiene conducted a lead-paint investigation at the premises and, on December 10, 2012, a violation report was mailed to Martinez.

Title to the property passed to Wang on December 29, 2012, and, in early January 2013, Wang received a violation notice and order to cure.

Wang complied with the order and sued Martinez and the title company to recover the costs of the lead-paint remediation.

Following a nonjury trial, the court awarded Wang $11,800 against Martinez and the title company. They appealed.

The appellate court's decision

The appellate court reversed.

In its decision, the appellate court explained that, at the trial, Martinez had testified that he had not been aware of the existence of a lead-paint condition at the time he was required to make the necessary disclosures and that he did not reside at the premises, did not receive mail there, and had never been informed by a tenant of either the inspection or the violation notice.

The appellate court found no proof establishing that the lead-paint condition had been known to Martinez on August 13, 2012, or prior to the closing. The appellate court also observed that the principal of the title abstract company had testified that, even as of February 2013, no reference to the investigation and violation report had appeared in the public record.

The appellate court then pointed out that the principal's unrebutted proof also established that an on-site lead-paint investigation had not been contemplated in the contract between Bruce A. Payne Associates, Inc., and Wang, and that neither Wang nor his counsel had asked that it be done prior to the closing.

The appellate court ruled that, absent proof of the seller's actual knowledge or a breach of the contract with the title abstract company, it could not be said that either defendant had "thwarted the plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor."

Accordingly, the appellate court reversed the judgment and ordered that Wang's complaint be dismissed as to each defendant.

The case is *Wang v. Martinez*, 51 Misc. 3d 145(A) (2d Dep't App. Term 2016).

Appellate court reinstates lead-paint lawsuit against defendant, finding evidence that lead paint had been located in baseboards and closet supports

The plaintiffs in this case filed suit to recover for injuries allegedly caused by exposure to lead paint. The trial court granted the defendant's motion for summary judgment, and the plaintiffs appealed.

The appellate court decision

The appellate court reversed.

In its decision, the appellate court explained that the plaintiffs, through the affidavit of their expert, had proffered evidence that their apartment had been tested and that lead paint had been located in the baseboards and closet supports.

This finding, the appellate court said, along with proof that the defendant had been on notice that a child under the age of seven resided at the apartment, was sufficient evidence that the defendant was on constructive notice of a lead hazard. That the apartment had been inspected earlier and no lead had been found went to the reasonableness of the defendant's behavior, an issue to be decided by a jury, the appellate court concluded.

The case is *Hill v. Lorac House, Inc.*, 135 A.D.3d 659 (1st Dep't 2016).

Conclusion

As the cases discussed here suggest, issues of proof, including a defendant's knowledge of a potential lead-paint problem, can be key to determining whether a lawsuit will be permitted to proceed or whether such a suit will be dismissed on a defendant's motion before trial. New York lawyers prosecuting and defending lead-paint claims must have a thorough understanding of the facts to best represent their clients—and remember that owners of multiple dwellings in New York City are held to the standard set forth in Local Law 1 while landowners outside the five boroughs of the city are held to a general negligence and notice standard.

About the author

Eric S. Strober, a partner in Rivkin Radler LLP's Complex Torts & Product Liability, General Liability, and Medical Malpractice Defense Practice Groups, represents clients in complex toxic tort, medical malpractice, construction, product liability, general, and auto liability cases in both state and federal courts, trying many cases to verdict.