251 A.D.2d 609, 675 N.Y.S.2d 112, 1998 N.Y. Slip Op. 06631
(Cite as: 251 A.D.2d 609, 675 N.Y.S.2d 112)

Supreme Court, Appellate Division, Second Department, New York.

Anthony **ANDRADE**, an Infant, by His Mother and Natural Guardian, Maria C. **ANDRADE**, et al., Respondents,

v.

Alex **WONG**, et al., Appellants, et al., Defendant.

June 29, 1998.

Tenants brought personal injury action against landlords, seeking recovery for injuries sustained by their infant son as result of ingesting lead paint chips in leased premises. Landlords moved for summary judgment. The Supreme Court, Queens County, Lisa, J., denied motion, and landlords appealed. The Supreme Court, Appellate Division, held that: (1) landlords' knowledge of peeling paint in leased premises did not constitute knowledge that premises contained lead-based paint; (2) notice from city health department to informing landlords that leased premises contained lead-based paint did not constitute actual notice of condition for purposes of this action; and (3) landlords' alleged failure to remedy lead-based paint hazard until after tenants had moved out was not relevant to action.

Reversed.

West Headnotes

[1] Landlord and Tenant 233 164(6)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k164 Injuries to Tenants or Occupants
233k164(6) k. Liability of Landlord as Dependent on Knowledge of Defects. Most Cited Cases

Notice as to lead-based paint condition cannot be predicated upon conclusory assertion that the use of lead-based paint in older buildings was "commonly known," and thus landlord's knowledge that paint in leased premises was chipping did not constitute notice that premises contained lead-based paint, for purposes of action brought by tenants whose infant suffered lead poisoning from exposure to lead-based paint in leased premises.

[2] Landlord and Tenant 233 164(6)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k164 Injuries to Tenants or Occupants
233k164(6) k. Liability of Landlord as Dependent on Knowledge of Defects. Most Cited Cases

Notice from city health department to informing landlords that leased premises contained lead-based paint did not constitute actual notice, for purposes of personal injury action brought by tenants whose infant suffered lead poisoning from exposure to lead-based paint in leased premises, where landlords received notice after infant had been diagnosed.

[3] Landlord and Tenant 233 169(5)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(5) k. Admissibility of Evidence. Most Cited Cases

Landlords' alleged failure to remedy lead-based paint hazard in leased premises until after tenants had moved out was not relevant to tenants' personal injury action against landlords for lead poisoning

injuries suffered by tenants' infant, where tenants offered no evidence that infant continued to ingest paint chips after being diagnosed, and no evidence that additional injury had been sustained by virtue of alleged continued ingestion of paint chips during this period.

****112** McMillan, Rather, Bennett & Rigano, P.C., Melville (Leslie R. Bennett and Richard A. Fogel, of counsel), for appellants.

Fitzgerald & Fitzgerald, P.C., Yonkers (John E. Fitzgerald, Michael D. Neuman, John M. Daly, and Delsia G. Marshall, of counsel), for respondents.

Before BRACKEN, J.P., and COPERTINO, McGINITY and LUCIANO, JJ.

MEMORANDUM BY THE COURT.

***609** In an action to recover damages for personal injuries, etc., the defendants Alex Wong and Eva Wong appeal from so much of an order of the Supreme Court, Queens County (Lisa, J.), dated June 10, 1997, as denied their motion for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the motion for summary judgment is granted, the complaint is dismissed insofar as asserted against the defendants Alex Wong and Eva Wong, and the action against the remaining defendant is severed.

The plaintiffs contend that the infant plaintiff Anthony Andrade suffered from lead poisoning as a result of exposure to lead paint in a single-family house leased from the defendants****113** Alex Wong and Eva Wong (hereinafter the appellants).

In order to prevail, it was incumbent upon the plaintiffs, in opposition to the appellants' prima facie showing of entitlement***610** to summary judgment, to lay bare their proof as to the appellants' actual or constructive notice of the lead paint hazard (*see, Brown v. Marathon Realty*, 170 A.D.2d 426, 427, 565 N.Y.S.2d 219; *see also, Juarez v. Wavecrest Mgt. Team*, 88 N.Y.2d 628, 649 N.Y.S.2d 115, 672 N.E.2d 135). The plaintiffs failed to discharge this burden (*see, Brown v. Marathon Realty, supra*).

[1] Notice as to a lead-based paint condition cannot be predicated upon a conclusory assertion that the use of lead-based paint in older buildings was "commonly known" (*Brown v. Marathon Realty, supra*, at 428, 565 N.Y.S.2d 219). Although it was established that the defendant Alex Wong was aware of the peeling and chipping paint within the subject premises, knowledge that an apartment contains chipping and peeling paint does not establish notice that the premises contained lead-based paint (*see, Lanthier v. Feroleto*, 237 A.D.2d 877, 654 N.Y.S.2d 531).

[2][3] Insofar as the plaintiffs contend that the appellants had actual notice from the New York City Department of Health, we note that this notice was received after the infant plaintiff was diagnosed with lead poisoning and, thus, could not serve as notice of the presence of lead-based paint which had already caused the injury. Further, although upon discovery of the lead-based paint, the appellants took no action to rectify the condition until after the plaintiffs had moved out of the house, this is of little import, since the plaintiffs offered no proof that the infant continued to ingest paint chips after being diagnosed, and submitted no evidence establishing that additional injury had been sustained by virtue of the alleged continued ingestion of paint chips during this period (*see, Brown v. Marathon Realty, supra*, at 428, 565 N.Y.S.2d 219).

N.Y.A.D. 2 Dept.,1998.
Andrade by Andrade v. Wong
251 A.D.2d 609, 675 N.Y.S.2d 112, 1998 N.Y. Slip Op. 06631

END OF DOCUMENT