New York Law Journal

NEW YORK, TUESDAY, OCTOBER 20, 1998

By Richard A. Fogel

Appellate Panel Saves Notice Defense In Single-Family Lead Paint Cases

CALL OFF the funeral. The out-of-possession landlord's traditional defense in a lead paint case — lack of notice of the hazard — remains viable according to the Second Department's June 29, 1998 decision in *Andrade v. Wong*, N.Y.L.J., July 8, 1998 at 33, col. 1 (QDS:16101621).

Moreover, the *Andrade* court confirmed that summary judgment should be granted if the plaintiff cannot demonstrate that the landlord had actual knowledge that peeling paint in the leasehold contained lead, citing *Lanthier v. Feroleto*, 237 A.D.2d 877, 654 N.Y.S.2d 531 (4th Dept. 1997), and that such knowledge will not be presumed on the conclusory theory that use of lead paint in older buildings is commonly known, citing *Brown v. Marathon Realty, Inc.*, 170 A.D.2d 426, 565 N.Y.S.2d 219 (2d Dept. 1991).

The "catch" is that *Andrade* involved a single-family house in Queens that was not subject to the New York City Law that applies to multiple dwellings (three or more apartments), NYCACC §27-2013. That statute was considered by the Court of Appeals in *Juarez v. Wavecrest Mgmt Team, Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996), in which the court held that landlords have an affirmative statutory duty to locate any lead paint in apartments where the landlords have notice (actual or constructive) that children six years or younger reside. *Juarez* effectively eliminates the hazard notice defense in such cases. Thus, *Juarez* is distinguishable from *Andrade*.

The *Andrade* decision is also limited because it does not address the issue of duty, despite extensive briefing on appeal and in the lower court, as well as oral argument urging clarification of the law. That is, whether an out-of-possession landlord of a single-family house has a duty to correct

---

Richard A. Fogel, *an attorney with McMillan, Rather, Bennett & Rigano, PC, of Melville, represented the landlord in the* Andrade *litigation discussed in this article.*

peeling interior paint once the house is leased and the tenant accepts the leasehold "as is" pursuant to a standard lease. Nevertheless, *Andrade* is significant because it clearly limits the reach of the *Juarez* decision regarding notice, to multiple dwellings in New York City. Thus, the notice defense is still effective in lead paint cases arising out of one-and-two-family houses in the City and all types of housing outside the City. An expansion of *Juarez* to single-family housing would have had far-reaching legal and economic consequences.

In *Andrade*, the plaintiffs leased a three-bedroom house in Jamaica Estates from an out-of-possession landlord who owned and leased several other houses in the area. The lease was a commonly used Blumberg form that contained the usual language accepting the leasehold "as is," and stated that the tenants "must keep, and at the end of the Term return the Premises ... in good order and repair." The lease also gave the landlord the right to re-enter the premises "to examine, to make repairs or alterations, and to show it to possible buyers, lenders or tenants."

Illegal Sublet

The new tenants moved virtually all of their possessions into one bedroom and proceeded to rent out the two other bedrooms illegally to two other tenants. The landlord contended that when he went to collect the rent, he noticed the unusual number of people and demanded that the tenants remove them from the premises.

The landlord admitted that the tenants complained about some interior cracks and peeling paint at several meetings, but the landlord contended that he told the tenants that the damage was caused by the tenants and the excessive number of people in the house and that the repairs were the tenants' responsibility. The tenants claimed that the landlord orally agreed to repair the cracks and repaint the interior where there was peeling paint.

Subsequently, the tenants' two-year-old child was diagnosed with blood lead poisoning. As a result, the landlord received notices of violation from the Lead Poisoning Bureau, and also received an order to vacate the premises from the Fire Department because of the excessive number of people in the house. It took several months for the landlord to evict the tenants, after which the lead paint violations were corrected to the Bureau's satisfaction and the Fire Department withdrew its order to vacate.

The tenants later sued the landlord in Queens County for personal injuries and loss of services of the two-year-old.

At the end of discovery, the landlord moved for summary judgment, arguing that as an out-of-possession landlord, he had no duty to repair the interior paint of a single-family house; that he had no prior notice that the peeling paint in the house contained lead (he denied knowledge of lead paint at his deposition); and that plaintiffs' claim for damages for loss of services of the two-year-old was patently absurd and improper.

The tenants argued in opposition that the house was a multiple dwelling because of the presence of the subtenants and therefore the landlord had a statutory duty under the City Code. Moreover, the tenants asserted that in addition to the statute, the "re-entry" clause in the lease imposed a duty on the landlord to repair and maintain the premises; that the landlord had prior notice of the use of lead paint by virtue of the fact that the landlord had a doctoral degree and was an experienced landlord and licensed broker; and that the loss of services claim was proper without specifically identifying what services a two-year-old provides that are economically compensable.

Duty Issue

The lower court agreed with the landlord that the house was not a multiple dwelling, but held that there may be a duty by virtue of the "re-entry" clause, which raised a question of fact for the jury to resolve. The lower court further held that the landlord had notice by virtue of the violation received from the Bureau. The lower court did not address the loss of services claim.

On appeal, the landlord again argued that there was no duty, that the "re-entry" clause does not create a duty unless there exists, in addition to the clause, a statute or express agreement, and that, in any case, the question of duty is a question of law and not an issue for the jury to decide. The landlord further argued that the notice of violation was received *after* the child was diagnosed so that it could not possibly serve as notice of the lead paint hazard. Finally, the landlord sought a ruling on the loss of services claim.

The tenants argued that the lower court ruled correctly on the duty issue (abandoning the multiple dwelling argument) and that the violation could serve as the predicate notice because the landlord delayed abatement for several months after receiving the violation until the tenants moved out.

At oral argument, it was apparent that the panel intended to rule based upon notice, when the first question put to the landlord's counsel was, assuming there was a duty, isn't it true

that there is no evidence of notice of lead in the peeling paint to the landlord prior to the diagnosis? The landlord's counsel agreed and said that the case could be decided on the issue of notice. Counsel was questioned on plaintiffs' assertion that the child was further injured by the delay in abatement after the violation was received, but the panel seemed satisfied with the response that the record did not support this assertion and that it was raised for the first time on appeal.

Beyond Notice

The landlords' counsel urged the panel to go beyond notice and address the duty question because of the significance of the issue to the thousands of single-family house rentals using the same form lease and because of the proliferation of lead paint lawsuits involving single-family houses. If plaintiffs' assertion of duty were upheld, then thousands of one and two-family houses (and multiple dwellings outside New York City) would be affected.

Owners of marginally profitable houses might abandon them rather than risk exposing themselves to verdicts in lead paint cases. The majority of those abandoned houses are likely to be "affordable" housing in neighborhoods like Jamaica Estates that desperately need decent affordable housing.

The panel listened to the landlords' argument but did not comment further. However, the panel fired away during the plaintiffs' oral argument, flatly rejecting counsel's assertion that notice could be assumed based upon the landlords' education, experience and brokerage license and rejecting the post-violation damage argument as unsupported by the record. The panel, however,. only asked questions pertaining to notice.

The decision issued by the Second Department in *Andrade* was consistent with the panel's comments and questions during the oral argument. The decision does not address the duty issue or the loss of services question. However, the *Andrade* decision regarding notice will effectively end many, if not most, of the lead paint lawsuits involving non-multiple dwellings, or involving any housing outside the jurisdiction of New York City, albeit on a case-by-case, summary judgment basis.

This method will cause unnecessary litigation, discovery, expense, insurance premiums (if the landlord can find such insurance) and use of limited judicial resources. Moreover, it is inevitable that eventually a plaintiff will get past the notice issue and the court will have to finally address the issue of duty.

Thus, the *Andrade* panel, while issuing a useful and important decision, nonetheless missed an even more significant opportunity to prevent and end a great deal of needless litigation, give guidance to the bar and to real estate interests and save millions of dollars in attorneys' fees and thousands of hours of court room time.

McMILLAN, RATHER, BENNETT & RIGANO, P.C.
48 South Service Road
Suite 300
Melville, New York 11747-2335
(516) 694-8000
(516) 694-2100 - Fax