SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANDRES GONZAGA HERNANDEZ and ALICIA GONZAGA HERNANDEZ, infants by their mother and natural guardian, LURDES GONZAGA,

Index No: 9188/09

Plaintiffs,

-against-

JASON REALTY CO. INC., MATTHEW JOHN KANJIRAVILYIL, WALTER B. GREENFIELD, M.D. ALCOTT H. HAMLET, M.D., WALTER B, GREENFIELD, PHYSICIAN, P.C. d/b/a HUDSON RIVER PEDIATRICS and HUDSON RIVER PEDIATRICS

Defendants.

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MATTHEW JOHN KANJIRAVILYIL,

Third-Party Plaintiff,

-against-

165-167 REALTY CORP. and MANUEL J. RAMOS,

Third-Party Defendants

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This memorandum of law is respectfully submitted in support of defendant Mathew John Kanjiravilyil's motion for summary judgment pursuant to CPLR 3212(b). There are five grounds upon which this motion for summary judgment, in whole and/or in part, is based: (1) Mr. Kanjiravilyil (movant) did not own the subject premises during the (approximate) three months plaintiffs resided there; (2) Movant did not have any notice of a hazardous condition at the premises prior to the diagnosis of lead poisoning of the plaintiff children as required by *Andrade v. Wong*, 251 A.D.2d 609, 675 N.Y.S.2d 112 (2nd Dep't 1998) and *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001); (3) The plaintiffs' father signed a release of all legal claims against movant when plaintiffs vacated the premises and received consideration for the release; (4) Plaintiffs cannot demonstrate causation such that they were exposed to a specific quantity of lead exclusively from these premises that is generally accepted by the scientific community to cause the alleged specific injuries asserted by plaintiffs as mandated by the Court of Appeals in *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006); (5) The punitive damages claim must be dismissed because plaintiffs cannot show "by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives" as required by *Munoz v. Puretz*, 301 A.D.2d 382, 753 N.Y.S.2d 463 (1st Dep't 2003). Movant also seeks such other and further relief as the court deems just and proper.

FACTS

In sum and substance, plaintiffs allege that the two infant plaintiffs were diagnosed with elevated lead levels in August 2005 after moving into the top floor of a legal two family house at 242 Valentine Lane, Yonkers in July 2005 owned by defendant

Jason Realty Inc. Movant Matthew John Kanjiravilyil is the sole shareholder of Jason Realty. There is no lease in this case and therefore there is no reservation by the landlord of the right to re-enter the premises and no assumption of a duty to repair (Ex. "G" at 38-39). This is an uncomplicated oral agreement to rent a third floor of a two family house in common law fee simple.

After the children were diagnosed in August 2005, the top floor where plaintiffs lived was tested for lead paint by the Westchester County Department of Health (DOH) on September 14, 2005 and the plaintiffs' mother was told by the DOH inspector at that time that there was lead in the house and that her family should move. (Ex. "N", Deposition transcript of DOH Inspector Steven Eschweiler at 14-15; Ex. "L" at 20, 23-24; Ex. "J" at 37). Movant knew nothing about lead poisoning whatsoever until he received a letter from the Westchester County Department of Health on September 19, 2005 (Ex. G at 70-71, 110) (Letter dated Sept 16, 2005 and received Sept 19 attached at Ex. "L" at 8-12). That letter was also when movant first learned there was lead paint in his house (Ex. "G" at 70-71). Plaintiffs received the same letter on or about the same date with a Spanish translation (Ex. "J" at 151-152).

Movant informed Mr. Gonzaga the next day after movant received the September 19, 2005 letter, that plaintiffs would have to move out of Valentine Lane immediately because of the lead paint and to permit repairs to abate the lead paint (Ex. "G" at 72-73, 77-80; Ex. "J" at 90-93) and confirmed the conversation in writing on September 22, 2005 (Ex. "O"). After movant told Mr. Gonzaga that he would have to immediately vacate Valentine Lane on September 20, 2005, Mr. Gonzaga told him he would look for another place to live (Ex. "G" at 72-73, 77-80; Ex. "J" at 90-93; Ex. "O"). Mr. Gonzaga informed movant that he was ready to move out when they met on October 16, 2005 and

so they entered into a written release whereby movant returned the security, unearned rent and paid some additional compensation for moving expenses for which Mr. Gonzaga, upon information and belief, signed, expressly stating "No further legal action taken whatsoever both parties tenant and landlord moved out paid in full security…" (Ex. "K"; Ex. "G" at 77-80).

In sum and substance, the plaintiffs lived in the premises for approximately three months, five years ago. The children had a pre-existing history of positive blood lead tests, with their lead levels being below 10 mg/dl (micrograms per deciliter) which it is noted is nevertheless in a range alleged by some scientific studies and proponents to be associated with adverse effects including cognitive and developmental effects. Thus the children would have had pre-existing lead-related damage according to these theories. As the plaintiffs in this case have not identified a threshold blood lead level below which alleged adverse effects do not occur, or identified a threshold duration of exposure less than which alleged adverse effects do not occur, then they must of necessity acknowledge the children's pre-existing blood lead levels and associated time periods in this case as causes of injury and attribute the same alleged injuries in this case to these pre-existing levels, using scientifically appropriate principles, or specify why such is not applicable based on scientifically appropriate principles. The record shows that the children were subsequently retested on a routine basis and identified as having higher, albeit modestly elevated levels one month after they moved into Valentine Lane (15 and 25), and were told to leave the premises in September 2005 approximately two months after they moved in and the house was tested. They did not leave the premises until October 2005 approximately one month after they were told to leave. In January 2006, approximately three months after they vacated the premises, and five months after being diagnosed, both

children had blood lead levels below 10. (Exhs. "P" & "Q"). There is no evidence that either child required or had any specific medical treatment or intervention for the blood lead levels, *i.e.* to chelate or medically remove lead from the body. From the history, the lead levels were simply monitored until January 2006 when the parents stopped having the children tested because the levels were below 10. Indeed, it appears the plaintiffs did not have any concerns about injuries that they now allege because the children were not tested again for lead for approximately six years until long after the instant law suit was filed

More detailed facts are set forth in the accompanying affirmation and exhibits and as pertinent to each of the arguments below. For the sake of brevity they are not repeated here and the court is respectfully referred to the affirmation, exhibits and argument for more detailed facts.

ARGUMENT

A. Movant Does Not Have Any Liability Because He Did Not Own The House When Plaintiffs Resided There in 2005

Movant transferred the title of 242 Valentine Lane to defendant Jason Realty Corp. on or about April 5, 1996 (Ex. "F"). Movant testified that he formed the corporation and transferred the property to the corporation on the advice of counsel (Ex. "G", Kanjiravilyil deposition transcript at 9; Ex. "H", Jason Realty deposition transcript at 7-10).

Plaintiffs orally agreed to rent the upstairs floor of the legal two family house on or about July 8, 2005 by paying a deposit (Ex. "I", Ex. "G" at 30-32, 39-48). Movant testified that he gave Mr. Gonzaga the key on July 11, 2005 and movant assumes he

moved in shortly after paying the deposit (Ex. "G" at 43), and Mr. Gonzaga agreed (Ex. "J", Andres Gonzaga deposition transcript at 84-85).

Mr. Gonzaga further testified that at the time he inspected the third floor in July 2005, he liked the premises and wanted to live there and so he agreed to move into it, paying movant one month's security and one month's rent, a total of $1850, and at the time he was making perhaps $1500 per month and his wife was about to give birth to their third child (Ex. "J" at 87-88, 117-119).

Plaintiffs moved out of the upstairs floor of Valentine Lane on or about October 16, 2005 when the security deposit was returned to them by movant (Ex. "K") and both movant and Mr. Gonzaga testified that plaintiffs moved out on or about that date (Ex. "G", at 79-80); (Ex. "J" at 91-93). The Westchester County Department of Health Inspector confirmed in his records that the top floor was vacant when he was there on October 21, 2005 (Ex. "L" at 2, 8).

Movant transferred title to the property from Jason Realty to himself on or about October 27, 2005 (Ex. "M"); (Ex. "H" at 25).

Accordingly, the facts are indisputable that movant did not own 242 Valentine Lane at the time plaintiffs resided there. Therefore, movant respectfully submits that there is no good faith basis upon which to seek liability against movant for plaintiffs' alleged lead paint injuries. Respectfully movant requests that the complaint be dismissed against him in all respects.

B. <u>Lack Of Notice to Movant</u>

Ignoring the fact that movant was not the landlord at that time plaintiffs resided there for approximately three months in 2005, it is plaintiffs' burden to demonstrate notice to the landlord of a lead paint hazardous condition at the premises. *Andrade v. Wong*, 251 A.D.2d

609, 675 N.Y.S.2d 112 (2nd Dep't 1998). *Accord Batista v. Mohabir*, 291 A.D.2d 365, 737 N.Y.S.2d 117 (2nd Dep't 2002); *Haider v. Rahim*, 273 A.D.2d 442, 711 N.Y.S.2d 751(2nd Dep't 2000); *Perez v. Ward*, 271 A.D.2d 590, 706 N.Y.S.2d 160 (2nd Dep't 2000). A landlord cannot be held liable in a lead paint personal injury suit if the landlord had no knowledge of a dangerous condition. *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001).

In this case, it is undisputed that movant knew nothing about lead poisoning whatsoever until he received a letter from the Westchester County Department of Health on September 19, 2005 (Ex. G at 70-71, 110) (Letter dated Sept 16, 2005 and received Sept 19 attached at Ex. "L" at 8-12). 15. That letter was also when movant first learned there was lead paint in his house (Ex. "G" at 70-71).

Plaintiffs received the same letter on or about the same date with a Spanish translation (Ex. "J" at 151-152) and actually already knew about the lead paint five days before movant received the letter because Mrs. Gonzaga was present when the Westchester County Department of Health Inspector tested the premises on September 14, 2005 and he told her there was lead in the house when the testing was done (Ex. "N", Deposition transcript of DOH Inspector Steven Eschweiler at 14-15; Ex. "L" at 20, 23-24; Ex. "J" at 37).

Movant informed Mr. Gonzaga the next day after movant received the September 19, 2005 letter, that plaintiffs would have to move out of Valentine Lane immediately because of the lead paint and to permit repairs to abate the lead paint (Ex. "G" at 72-73, 77-80; Ex. "J" at 90-93) and confirmed the conversation in writing on September 22, 2005 (Ex. "O").

There is no lease in this case and therefore there is no reservation by the landlord of the right to re-enter the premises and no assumption of a duty to repair (Ex. "G" at 38-39). This is an uncomplicated oral agreement to rent a third floor of a two family house in common law fee simple. Consequently, the elements of constructive notice required by the Court of Appeals in *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001) are not present here.

Accordingly, there is no actual or constructive notice of a lead paint hazard to movant. Respectfully, as a matter of law, movant is entitled to summary judgment on the issue and therefore dismissal of this action.

C. <u>Plaintiffs Released All Claims In Writing After Receiving Consideration</u>

A release is a contract and its construction is governed by contract law. *Cardinal Holdings, Ltd. v. Indotronix Intern. Corp*., 73 A.D.3d 960, 902 N.Y.S.2d 123 (2nd Dep't 2010); *Kaminsky v. Gamache*, 298 A.D.2d 361, 751 N.Y.S.2d 254 (2d Dep't 2002). Interpretation of a release is within the province of the court and if the language is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence. *In re Transtate Ins. Co*., 297 A.D.2d 684, 747 N.Y.S.2d 243 (2nd Dep't 2002). Movant respectfully submits that no further legal action means what it says, no legal actions may be filed between the parties arising out of the tenancy and that includes the instant action. The meaning is unambiguous, especially considering the release was negotiated, drafted and agreed to by laymen.

Mr. Gonzaga admits that he received the money and that he met with movant (Ex. "J" at 90-93). He also admits that he does not recall if Mr. Kanjiravilyil gave him something in writing after he met with movant about leaving (Ex. "J" at 91). The release appears to be signed twice by Mr. Gonzaga (Ex. "K") and movant explained that he gave

money to Mr. Gonzaga on two separate days, the second time after Mr. Gonzaga returned the keys (Ex. "G" at 80). Mr. Gonzaga denies that the two signatures on the release are his although he admits meeting with movant, receiving the money, moving out on or about the date of the release and further admits that he does not recall any writing (Ex. "J" at 91-93).

Movant respectfully submits that the evidence overwhelmingly weighs in favor of the conclusion that Mr. Gonzaga signed the release of all further legal actions to receive the money. While Mr. Gonzaga denies the two signatures are his, he admits he does not even recall if there was a writing. Other than a self-serving denial, there is no evidence that he did not sign a release. If the Court determines that a self-serving denial is enough evidence to warrant a factual trial, than movant respectfully requests that the trial be limited to the issue of whether Mr. Gonzaga signed the release that contains his signature.

D. Lack of Causation Pursuant to *Parker v. Mobil Oil Corp*

Plaintiffs' claims of alleged personal injuries from exposure to lead paint while residing on the third floor of movants' house for approximately three months in 2005 (more than five years ago) fails on causation grounds for two reasons as set forth by the Court of Appeals in *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006): (1) Plaintiffs cannot provide the quantitative level of exposure to lead from that house that would cause their claimed injuries, even assuming that the plaintiffs actually have any alleged deficits which causes them to differ from their pre-exposure conditions ; and, (2) They cannot demonstrate a scientific basis that lead causes some of the alleged specific deficits and distinguish or apportion said deficits to specific periods and quantities of exposure.

In *Parker*, a gas station worker claimed that exposure to benzene, a generally accepted carcinogen and a known component of fuel products, caused his particular cancer. The court explained that merely because benzene is a cancer causing substance and that plaintiff worked with fuel that exposed him to benzene, it does not follow that plaintiff does not have the burden of demonstrating that he was exposed to a sufficient quantity of the substance to cause the claimed injuries and that the specific injury can be caused by benzene exposure. That is, he must show: (a) with a reasonable degree of scientific certainty, the quantitative level of exposure to benzene he received (from defendant's product and/or at defendant's premises); and (b) that the exposure level, with a reasonable degree of scientific certainty - caused the claimed injury. 7 N.Y.3d at 447-50, 824 N.Y.S.2d at 589-91. Thus, just because benzene is known to cause cancer, plaintiff has cancer and benzene was at the defendants' premises, it does not *ipso facto* mean the benzene at that premises caused plaintiff's cancer or legally, that plaintiff meets his burden of demonstrating toxic tort causation merely by being diagnosed with cancer after having worked at a gas station. He needs to show more than that: what was the quantitative level of benzene to which he was exposed (with a reasonable degree of scientific certainly) and is that level known to cause plaintiff's particular cancer (with a reasonable degree of scientific certainty).

Like *Parker*, plaintiffs in this case offer no evidence of quantification of exposure to lead in the house resulting in lead in the blood, and then in turn with alleged deficits, within a reasonable degree of scientific certainty. As in *Parker*, they are simply asserting they had blood lead, the house had lead and therefore the house caused the lead. More than that, they are also jumping to the conclusion that the house caused their various vague, poorly defined and in many cases wholly speculative injuries or deficits. That

assertion does not in any way meet the standards set forth by the Court of Appeals in *Parker* for causation in a toxic tort case. To meet those standards, plaintiffs have to show quantitatively how much lead they were exposed to in the house with a reasonable degree of scientific certainty, that exposure to the lead caused their blood lead levels with a reasonable degree of scientific certainty and that those elevated levels caused the claimed injuries, and distinguish such from other factors and sources with a reasonable degree of scientific certainty.

Further, there is no evidence that the two children received any specific medical treatment or intervention for the modestly elevated lead levels during the time period that such levels were documented, or for that matter within the approximate five months when they were being tested following the initial findings. They were simply retested as explained above and the lead levels resolved by January 2006 by themselves. How is there a claim of injury when there is no documented medical treatment for alleged injuries, either at that time or any time thereafter? What plaintiffs' assert as "injuries" is nothing more than a series of unsubstantiated vague and often meaningless list of speculations that they cannot begin to show with a reasonable degree of scientific certainty as required by *Parker*. In short, if they cannot even prove there is a recognizable injury, than how can they begin to prove causation of that injury?

Plaintiffs' bills of particulars (Ex. "R") allege the following injuries most of which appear formulaic with no connection to the actual facts:

a. Anemia (blood iron deficiency): no diagnosis or evidence of this during the time period at issue.

b. Plumbism: this literally means lead poisoning so they are saying the children have elevated lead levels which are not a specific injury; rather it is a condition which resolved itself with no medical intervention in a matter of five months or shorter.

c. Inability to synthesize proteins: no diagnosis or evidence of this.

d. Necessity for multiple blood tests: children are required to get blood lead and other blood tests as part of routine medical care.

e. Inability to speak full sentences at two years of age – various language issues etc.: Alicia was four when plaintiffs moved and she was diagnosed with elevated lead and Andres was already two so the allegation has nothing to do with the actual facts of the case. Besides, there is no diagnosis or evidence of this.

f. Increase in bony formations: no diagnosis or evidence of this.

g. Opaque dots in the abdomen/paint chips in the rectum: no diagnosis or evidence of this.

h. Developmental delays, loss of IQ, brain damage, memory loss etc.: No diagnosis or evidence of this. This is rank speculation and nothing more.

i. "Impaired visual attention": There is no diagnosis or evidence of this.

j. Behavioral/anti-social/self-esteem/ADD etc.: No diagnosis or evidence of this.

k. Physical mental pain and suffering: No diagnosis or evidence of this.

l. Sleep disorders: No diagnosis or evidence of this.

m. Loss of appetite/constipation: no diagnosis or evidence of this.

n. Joint and connective tissue disease etc.: no diagnosis or evidence of this and appears to be rank speculation.

o. Exacerbation of all of the above: no diagnosis or evidence.

p. "Infant Plaintiff has never worked and due to injuries sustained as a result of defendant's negligence, will never be able to engage in meaningful employment"…; Rank speculation, no evidence no diagnosis and frankly non-sensical.

In *Parker*, there was no question that the plaintiff had cancer. Further, there was no question that benzene to a reasonable degree of scientific certainty could cause cancer. The issue was the plaintiff could not show to a reasonable degree of scientific certainty that he was exposed to a threshold level of benzene that could cause the cancer he had. In this case, plaintiff cannot even show an injury to a reasonable degree of scientific certainty. Further, there is absolutely no evidence that the modestly elevated blood lead levels at issue in this case and observed within a five month period of testing could cause the claimed injuries, even if the children had those injuries (*i.e*. general causation). Finally, as in *Parker*, the plaintiffs cannot demonstrate a specific level of exposure to lead paint that could cause the blood lead levels during this period, and distinguish such from the documented pre-existing exposure as demonstrated by their earlier levels, to a reasonable degree of scientific certainty. Accordingly, *Parker* mandates that the claims be dismissed.

E. <u>The Punitive Damages Claim Must Be Dismissed</u>

Plaintiffs assert a claims for willful disregard, wonton behavior, intentional conduct, tremble damages and punitive damages generally against movant in paragraphs 103, 124 and 142 and possibly elsewhere in the complaint (Ex. "C") and also in the bills of particulars (Ex. "R").

The punitive damages claim must be dismissed because plaintiffs cannot show "by clear, unequivocal and convincing evidence, egregious and willful conduct that is

morally culpable, or is actuated by evil and reprehensible motives" as required by *Munoz v Puretz*, 301 A.D.2d 382, 753 N.Y.S.2d 463 (1st Dep't 2003).

In this case, it is undisputed that Mr. Kanjiravilyil knew nothing about lead poisoning whatsoever until he received a letter from the Westchester County Department of Health on September 19, 2005 (Ex. G at 70-71, 110) (letter dated Sept 16, 2005 and received Sept 19 attached at Ex. "L" at 8-12). That letter was also when movant first learned there was lead paint in his house (Ex. "G" at 70-71).

Thus, there is absolutely no evidence of egregious conduct less yet clear and convincing evidence which is required to seek punitive damages. Therefore, to the extent plaintiffs seek punitive damages from movant, those claims must be dismissed.

CONCLUSION

For the foregoing reasons, movant respectfully submits that the action be demised against him in all respects, or alternatively, the claims for wages to the mother and for punitive damages be dismissed and that such further and/or additional relief be granted by the court as it deems just and proper.

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Dated: Islip, N.Y.
~~May __,~~October 31, 2011

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