APL-2014-00315

Bronx County Clerk's Index No. 2268/06

Court of Appeals

STATE OF NEW YORK

YANIVETH R., an infant by her mother and natural guardian, RAMONA S., and RAMONA S., Individually,

Plaintiffs-Appellants,

against

LTD REALTY CO., and LTD REALTY CO., LLC,

Defendants-Respondents,

SIMONE DAMESEK, AS EXECUTRIX OF THE ESTATE OF RAPHAEL DAMESEK, JOSHUA DAMESEK, RAY DAMESEK,

Defendants,

and

LTD REALTY CO.,

Third-Party Plaintiffs,

against

2716-18 OWNERS CORP., and LEOR MANAGEMENT GROUP,

Third-Party Defendants.

BRIEF FOR *AMICUS CURIAE* COMMITTEE OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law

schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This action is premised on the claim that the infant plaintiff was exposed to lead paint. Plaintiff seeks to impose liability on defendant, which was the owner of the building where her grandmother provided babysitting services for her. The thrust of plaintiff's appeal is that she was a resident of defendant's building for purposes of lead paint liability.

DANY respectfully submits that this Court should reject plaintiff's unwarranted attempt to expand the definition of the word "reside" so as to create liability in this case.

The regulation in issue in this case, New York City's "Lead Paint Law," extends protection to children who reside in a defendant's building. The regulation speaks of no other scenario, and certainly not the one in the case, where the child's grandmother resided in the building and the child did not.

The determinations of both of the courts below should be affirmed.

STATEMENT OF FACTS

This is an action for damages for exposure to lead paint.

The infant plaintiff, Yavineth R., ("plaintiff"), was born in 1997 (R 145, 207, 214). From her release from the hospital after her birth until April 1998, plaintiff resided with her mother, Ramona Santana, ("Mrs. Santana"), at 220 Miriam Street, Bronx, NY (R 214). Thereafter, Mrs. Santana and her immediate family, including the plaintiff, moved to 2718 Marion Street, Apartment 4E, Bronx, NY (R 215). Victoria Collazo, plaintiff's grandmother,[1] resided nearby in Apartment 1F at 219 Miriam Street, Bronx, NY (R 233, 424). Mrs. Collazo moved into that apartment in 1995 with her daughter, Kelli Rodriguez (R 425, 426, 449). During the relevant time period, no child other than Kelli resided with Mrs. Collazo in Apartment 1F at 219 Miriam Street (R 235, 457).

At the pertinent time, defendant LTD Realty Company (hereinafter "defendant") owned the property known as 219 Miriam Street, Bronx, NY (R 286, 469). A related company, R.J. Equities, managed the property (R 288, 469). Joshua

[1]Mrs. Collazo is referred to in certain portions of the Record as "Mrs. Diaz," her name from a different marriage.

Damesek was the managing agent for R.J. Equities (R 288). He was assisted by two people: his father, Raphael Damesek, who was the president of R.J. Equities, and Maria Colon, who was the company's office manager (R 289, 469). In addition, a superintendent, Alejandro Rivera, worked and lived at the premises at 219 Miriam Street (R 290, 469). Mr. Rivera's duties included cleaning the building, doing minor repairs, and otherwise reporting to management when issues arose (R 291, 469).

When tenants moved in, they were asked whether any children would be residing in the rented premises, since window guards would need to be installed if children were residing therein (R 296). Mrs. Collazo's lease did not reflect that she had any children residing in the apartment (R 471 - 476). Annually thereafter, notices were sent out to the tenants, again asking if children resided in the apartment (R 296). At her deposition, Mrs. Collazo was unable to say when window guards were placed in the windows of her first floor apartment (R 428 - 429). She testified that the guards were installed at some point; however, she was unable to state that the guards were installed because of the plaintiff's presence in her apartment (R 428 - 419). She testified that the guards could have been installed because

her daughter Kelli was also residing in the apartment and for protection from outsiders since the apartment was on the first floor (R 428 - 429, 453). She also testified that she has no recollection of receiving the annual window guard notices (R 452).

Mrs. Santana returned to work approximately three months after plaintiff's birth (R 233). At that time, Mrs. Collazo began to watch her granddaughter in the 219 Miriam Street premises (R 153, 233, 426). As Mrs. Collazo acknowledged, plaintiff did not live with her: "I lived at 219 Miriam Street, the girl [plaintiff] lived with her mother but I was the girl's babysitter." (R 448) At her deposition, Mrs. Collazo was unable to remember informing building management that she was babysitting plaintiff in her apartment (R 447). While Mrs. Collazo testified that she believed the superintendent knew, she could not recall how she came to form that belief (R 447-448). Mrs. Collazo also denied ever telling Ms. Colon that she was babysitting for the plaintiff in her apartment, despite speaking with her at least once a year (R 435, 448).[2]

[2]Mrs. Collazo's testimony is allegedly refuted by an affidavit, in English, dated two and one half years prior to her deposition (R 657 - 658). The propriety of the affidavit, which had not been disclosed prior to its submission in opposition to the motion, and plaintiffs' reliance

Mr. Damesek testified that he did not know Mrs. Collazo, Mrs. Santana or the plaintiff (R 303 - 304, 470). He had no conversations with the superintendent regarding any of them (R 304). Nor did he recall having any conversations with his now-deceased father regarding them (R. 304). Mr. Damesek testified that he knew that only Mrs. Collazo was residing in Apartment 1F at 219 Miriam Street (R 304 - 305). Mr. Damesek had no recollection of being in Apartment 1F at 219 Miriam Street between the time Mrs. Collazo took up residence in 1995 and the date he received the lead abatement order (R 470). He first became aware of the plaintiff's supposed residence in that apartment when a lead abatement notice was received in February 1998 (R 470).

Defendant moved for summary judgment, arguing, among other things, that it had no duty to plaintiff, since plaintiff did not reside in its building. The Supreme Court granted the motion (R 9 - 12), and that determination was affirmed by the Appellate Division (R 760 - 761).

Thereafter, this Court granted plaintiff's motion for permission to appeal (R 757).

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thereupon, was addressed by defendant's counsel in her reply affirmation in the court of original instance (R 679 - 682).

POINT I

THE INFANT PLAINTIFF DID NOT "RESIDE" IN THE DEFENDANT'S BUILDING UNDER THE STRAIGHTFORWARD AND COMMON-SENSE READING OF LOCAL LAW 1, AND THE APPELLATE DIVISION, FIRST DEPARTMENT CORRECTLY DISMISSED THE COMPLAINT THAT WAS BASED UPON HER ALLEGED EXPOSURE TO LEAD PAINT

The issue in this case concerns the interpretation of one word in a statute. That word is "reside," and that statute is Local Law 1. The statute imposes liability upon an owner of a multiple dwelling only if the owner has notice a child or children under the age of six "reside" in their building. According to the plain meaning of the word and basic principles of sound statutory interpretation, "reside" means where one lives and makes his or her home.

In Rosner v. Metropolitan Property and Liability Insurance Company, 96 N.Y.2d 475 (2001), this Court stated that:

> [T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof . . .. In the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase.

96 N.Y.2d at 479-480, (citations and internal quotation marks omitted).

Applying the foregoing principles to the questions presented herein leads to the conclusion that plaintiffs' arguments have no merit. A residence means one's home, and not a babysitter's abode.

Reference to dictionaries as "useful guideposts" is also instructive. For instance, the *American Heritage Dictionary of the English Language* defines reside as "to live in a place permanently or for an extended period." http://www.ahdictionary.com. The *New Oxford American Dictionary* defines the verb "reside" as to "[h]ave one's permanent home in a particular place." http://www.oxfordreference.com. Accordingly, the Appellate Division, First Department's ruling should be affirmed, and plaintiffs' attempt to unreasonably expand this meaning of this word to fit their subjective intent and expand the protections of the statute to include scenarios never envisioned by the Legislature should be rejected.

Local Law 1 – New York City Administrative Code § 27-2013(h)(1) provides that in any multiple dwelling constructed before January 1, 1960 in which surfaces have peeling paint, and "in which a child or children six (6) years of age or

under reside," the law will presume that the peeling substance contains lead. The statute does not define the term "reside." Contrary to plaintiffs' exhortations, this appeal does not involve legislative history or the acknowledged harms caused by lead paint: it concerns the definition of the word "reside."

As plaintiffs acknowledge in their legal argument, the definition of reside is to "live in a particular place." The infant plaintiff in this case, however, did not "live" in her grandmother's apartment. But plaintiffs ask this Court to venture into the minds of the Legislators to expand the plain definition of "reside" to include places where the child spent time while being babysat. Justice Oliver Wendell Holmes cautioned against such activity when he noted "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899). Accordingly, any "intent" must be determined from the words of the text. See, Charles Fried, Sonnet LXV and the "Black Ink" of the Framer's Intention, 100 Harv. L. Rev. 751, 759 (1987).

Thus, the courts must look to the objective meaning of words. A fair reading of the word "reside" leads to the

inescapable conclusion that it means where one lives; where a person has their residence. It does not mean a place where an individual spends an amorphous and indeterminate significant amount of time, as plaintiffs demand. Although plaintiffs claim the threshold in this case would be the alleged 50 hours per week that the infant plaintiff spent with her grandmother, to create such an unworkable and uncertain standard would eviscerate the meaning of the operative word: "reside". Chief Justice Marshall implored long ago to look to the words and in what sense they are used in order to determine intent:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (opinion of Marshall, C.J.)

Justice Holmes discussed this issue in connection with the word "vehicle" as it was used in the National Motor Vehicle Theft Act in McBoyle v. United States, 283 U.S. 25

(1931). In McBoyle, the petitioner was convicted of transporting from Illinois to Oklahoma an airplane he knew had been stolen. The Act in question defined the term "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." The issue before the United States Supreme Court was the meaning of the word "vehicle" in the phrase "any other self-propelled vehicle not designed for running on rails." Justice Holmes ruled that while it was "etymologically" possible for an airplane to be considered a vehicle, "in everyday speech 'vehicle' calls up the picture of a thing moving on land." Id., 283 U.S. at 26.

Similarly, in common parlance, the word "reside" means where one lives, not where an individual spends "significant," "substantial," or some other indeterminate threshold of time. As Justice Cardozo once noted "we have not traveled in our search for the meaning of the lawmakers, beyond the borders of the statute." United States v. Great Northern Ry., 287 U.S. 144, 154 (1932). Based upon the text of Local Law 1, its purpose was to protect children living in multiple-dwelling apartments constructed before 1960 where there was evidence of peeling or chipping paint. The Legislature was precise in the words it chose, and the

meaning of the word "reside" is evident from a straightforward reading of the statute.

According to the interpretation which plaintiffs urge this Court to adopt, all owners of multiple dwellings would need to track the movements of all who enter their buildings, since plaintiffs seek to enlarge the meaning of reside to include instances where a child spends a substantial or significant amount of time in the building. While plaintiffs claim that a residence should include where a person spends 50 hours per week at a location, they do not indicate whether this is the floor or ceiling. Use of such amorphous and imprecise definitions violates Chief Justice Marshall's charge that words are to be understood given their everyday meanings, unless the text indicates otherwise: "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Gibbons v. Ogden, 22 U.S. (I Wheat.) 1, 71 (1824). Justice Story echoed this sentiment that words in statutes are to be given their plain and common-sense meaning:

> [E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context

> furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.

Joseph Story, Commentaries on the Constitution of the United States, 157-58 (1833).

Plaintiffs seek to greatly enlarge the protections of Local Law 1 by jettisoning the plain meaning of the word reside. As this Court has previously recognized, while many words have multiple meanings, the word "reside" in the context of this statute, in common sense, means where the child lives and makes his or her residence. In Juarez v. Wavecrest Management Team, 88 N.Y.2d 628, 646 (1996), this Court analyzed Administrative Code § 27-2013(h) and held that liability may be imposed upon a landlord for injuries to a child caused by a lead hazard only where the landlord had actual or constructive notice of both (a) a hazardous lead condition, in excess of the statutory minimums, in an apartment located in a building built before 1960, and (b) that a child six years of age or younger resided therein. In

other words, under Local Law 1, a landlord who has notice of a child under seven years old *living* in one of its [pre-1960, multiple dwelling] apartments is a landlord who has notice of any hazardous lead condition in that apartment causing injury to that child. See, Chapman v. Silber, 97 N.Y.2d 9, 15 (2001).

The Appellate Divisions have followed this sound logic. In Michaud v. Lefferts 750, LLC, 87 A.D.3d 990 (2nd Dep't 2011), the infant plaintiff was allegedly exposed to a hazardous lead-based paint condition. Plaintiffs sued Lefferts 750, LLC ("Lefferts"), the owner of the apartment where the infant plaintiff resided with her parents ("the Lefferts apartment"), and 91 East 21st Street, LLC, and El Management, LLC ("the 91 East defendants"), the respective owner and manager of the apartment where the infant plaintiff's maternal grandmother lived. The infant plaintiff stayed at the maternal grandmother's apartment ("the 91 East apartment") every day after school and would sleep over at least two or three times per week. The infant plaintiff was diagnosed with an elevated blood lead level in April 2004. Plaintiffs alleged that Lefferts and the 91 East defendants violated their statutory and common-law duties to abate and eliminate the hazardous lead-based paint conditions in their

respective apartments.

The 91 East defendants moved to dismiss and argued they were not liable under Local Law 1 because the infant plaintiff did not reside in their building. In affirming the dismissal of the complaint against the 91 East defendants, the Appellate Division, Second Department noted that under the relevant versions of Local Law 1, "the duty of an owner of a multiple dwelling to remove or cover hazardous lead-based paint is triggered *only* when a child of applicable age "reside[s]" in a dwelling unit." 87 A.D.3d at 992-93 (citations omitted) (emphasis added). The Appellate Division ruled that the 91 East defendants were not liable because the infant plaintiff "did not reside in the 91 East apartment." Id., at 993. The Appellate Division continued that because "the 91 East defendants demonstrated that a 'young child' did not 'live[ ] in the apartment,' they established their prima facie entitlement to judgment as a matter of law on the cause of action alleging common-law negligence." Id. (citations omitted).

Here, the defendant showed the infant plaintiff did not live in its building. While she may have visited with great frequency and spent time there, she did not "reside" in the building under the plain meaning of the word. See, Hanlan v.

Parkchester N. Condominium, Inc., 32 A.D.3d 799, 799 (1st Dep't 2006)(concluding that even if one assumed Local Law 1 applied to the defendants, "the infant plaintiff did not reside in the condominium unit at issue, but instead lived in a unit distinct from that in which the lead paint condition was found.")

Similarly, in Worthy v. New York City Housing Authority, 18 A.D.3d 352 (1st Dep't 2005) the Appellate Division also followed Chief Justice Marshall's admonition from Gibbons. In Worthy, the Appellate Division concluded that there was "insufficient [evidence in the record] to support an inference that defendant Housing Authority had timely notice that a child under the age of seven resided in the apartment on its premises where the infant plaintiff is alleged to have contracted lead poisoning." Id. (citation omitted). The First Department reasoned that the Housing Authority's records "did not indicate that a child of less than seven years *lived in the subject apartment*, and plaintiffs' evidence, to the effect that various Housing Authority employees occasionally observed the infant plaintiff in the company of his aunt, the tenant of record of the apartment, was insufficient to raise any triable issue as to whether the Housing Authority had actual or constructive notice of a

child's residency in the unit." Id. (emphasis added); see, also, Byrd v. 2015 Caton Ave., LLC, 57 A.D.3d 933 (2nd Dep't 2008)(granting summary judgement to defendant landlord where plaintiff failed to raise a triable issue of fact with respect to the landlord's notice of an infant's residency in the subject apartment); Matter of Vega v. New York City Hous. Auth., 52 A.D.3d 294 (1st Dep't 2008) (holding the defendant met its prima facie burden of establishing lack of notice that a child under seven years of age resided in the subject apartment).

Rather than rely upon the plain meaning of the word "reside" in the context of Local Law 1, plaintiff seeks to undo decades of precedent by citing to this Court's decision in In re Estate of Newcomb, 192 N.Y. 238 (1908), which concerned an application for the revocation of ancillary letters testamentary against a will's trustee. Unlike this case, the question in Newcomb was not one of statutory interpretation. In Newcomb, the decedent *chose* to call her domicile the city of New Orleans, Louisiana as opposed to New York City before her death, and the effect of such decision had an enormous impact upon the distribution of her $2 million estate. The question before the Newcomb Court was whether the decedent was competent to declare herself a

domiciliary of New Orleans. In contrast, in this case, the issue concerns the statutory interpretation of the word "reside" in Local Law 1. Thus, this Court's ruling in Newcomb has no application to this case, and it should reject plaintiffs' overtures to use it to alter the plain meaning of the word "reside."

Plaintiff also cites to this Court's ruling in Dean v. Tower Insurance Company of New York, 19 N.Y.3d 704 (2012). The issue in Dean concerned "whether the term 'residence premises' in an insurance contract is ambiguous where an insured purchased a homeowner's policy in advance of a closing but was unable to move in due to the need for major repairs." Id. This Court concluded that the term "residence premises" in the policy was ambiguous. Id. This Court compared the Tower Insurance policy to the standard fire policy in Insurance Law § 3404(e), which used the term occupancy and referred to Insurance Law § 3404(f)(1)(A), which states that a policy "with respect to the peril of fire" cannot contain provisions "less favorable to the insured than those contained in the standard fire policy." Id., at 709. Further, "Tower's letter disclaiming coverage also speaks in terms of occupancy." Id.

There are no similar circumstances in this case. This

Court need not refer to any other statutes or contracts to ascertain the meaning of the word "reside" in Local Law 1. Newcomb did not involve the interpretation of a statute or contract, and Dean dealt with the interplay of an insurance contract and a specific command in the controlling statute that policies cannot provide less favorable coverage than contained in the standard policy identified in the statute.

Contrary to plaintiff's charges herein, the Appellate Division did not substitute its own definition of "reside" and "residence." As this Court can readily see from the cited definitions and prior rulings, the First Department, consistent with prior precedent, employed the common-sense definition of the word.

Plaintiff argues that the Appellate Division's ruling "improperly narrows a landlord's statutory and common law duty to remove hazardous conditions from its premises." To the contrary, the holding reinforces proper statutory interpretation and follows decades-old legal precedent. To hold otherwise would eviscerate the meaning of the word "reside," resulting in it including any child who enters a building for whatever period of time, whether for 50 hours or 50 minutes per week. This would impose a duty on landlords to monitor the movements of every resident and non-resident

who enters their building at any time, for any period of time. Any change to a statutory term where its meaning can be ascertained by employing its plain, common-sense definition should come from the Legislature, not from the courts, and it is respectfully submitted that the ruling of the Appellate Division, First Department be affirmed.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
July 30, 2015

Respectfully submitted,

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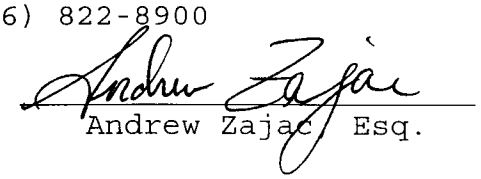
By: 
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