

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JONATHAN DAVIS, a minor, by and	:	
through his parent and natural	:	CIVIL ACTION
guardian, WENDY DAVIS, and	:	
WENDY DAVIS in her own right,	:	
	:	
Plaintiffs,	:	
v.	:	No. 96-1665
	:	
PHILADELPHIA HOUSING AUTHORITY,	:	
et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

DECEMBER 3, 1998

Plaintiffs brought this case to recover for injuries Jonathan Davis suffered as a result of ingesting lead-based paint. Defendant Philadelphia Housing Authority ("PHA") filed a Motion to Dismiss pursuant to Rule 12(b)(6) and alternative Motion for Summary Judgment. This Court informed the parties that it would treat the Motion as a Motion for Summary Judgment and allowed the Plaintiffs time to conduct limited discovery and file supplemental materials. For the reasons that follow, PHA's Motion will be granted.

Background

PHA administers "Section 8," a low-income housing program within the City of Philadelphia which subsidizes the rents of low-income tenants within the private housing market. Section 8 housing assistance is provided by the federal

government. See 42 U.S.C. § 1437f. The program is authorized by federal legislation that was enacted "to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income." 42 U.S.C. § 1437. To obtain the housing assistance funding, PHA enters into a contract with the United States Department of Housing and Urban Development ("HUD"). The contract is referred to as an Annual Contributions Contract ("ACC").

On or about July 1, 1993, Defendant Miriam Shaw leased the residential apartment on the second floor of 6915 North Broad Street to Plaintiff Wendy Davis. During the period that Plaintiffs occupied the apartment, Plaintiff Jonathan Davis was allegedly exposed to and ingested lead paint, and, as a result, developed lead poisoning and sustained permanent personal injuries. Plaintiffs do not allege that they were Section 8 participants. Rather, they base their claim against PHA upon the fact that before the Plaintiffs rented the apartment, it was inhabited by a Section 8 tenant with a child under the age of seven.

The Plaintiffs' claims against PHA are based upon 42 U.S.C. § 1983 (Count I), breach of the ACC (Count II), and the Lead-Based Paint Poisoning Prevention Act ("LPPPA"), 42 U.S.C. § 4821 et seq. (Count III). This Court previously dismissed the

Plaintiffs' claims against PHA based upon the Plaintiffs' apparent lack of standing. The Third Circuit reversed and remanded the case. See Davis v. Philadelphia Housing Auth., 121 F.3d 92 (3d Cir. 1997). PHA then filed a Motion to Dismiss and Alternative Motion for Summary Judgment. After informing the parties that the Motion would be treated as a Motion for Summary Judgment, the Court allowed the Plaintiffs time to conduct discovery upon the issue of what duty, if any, PHA owed to the Plaintiffs.

Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Discussion

In order to prevail on their claim against PHA, the Plaintiffs must establish that PHA owed them a legal duty. This duty is set forth in the Plaintiffs' Complaint as follows:

"Defendant PHA's duties included a duty to inspect the unit for hazards resulting from lead-based paint, and remove any such hazards." (Am. Compl. at ¶ 17.) Count II of the Amended Complaint alleges that PHA breached the ACC by "failing to properly inspect for and remove hazardous conditions . . . which arose from the presence of lead based paint." (Id. at ¶ 23.) Count III, while not specifically alleging it, is also based upon a duty under the LPPPA and the United States Housing Act to remove lead-based paint from the apartment in which the Plaintiffs resided.

In their allegations of a legal duty owed by PHA, the Plaintiffs specifically cite 23 C.F.R. § 882.109(I), the Housing Quality Standard that applies to lead-based paint.¹ This standard is separated into seven subparts, only two of which are relevant to the Plaintiffs' case. Subsection (3) provides, in part:

(3) Defective Paint. In the case of a unit, for a Family which includes a child under the age of seven years, which was constructed prior to 1978, the initial

¹It should be noted that this regulation has been removed and redesignated since the instant Motion was filed. See 63 Fed. Reg. 23826, 23854 (1998).

inspection under § 882.209(h)(1), and each periodic inspection under § 882.211(b), shall include an inspection for defective paint surfaces. If defective paint surfaces are found, treatment as required by 24 C.F.R. 35.24(b)(2)(ii) shall be required in accordance with § 882.209(h) or § 882.211(b)-(c).

24 C.F.R. § 882.109(I)(3). "Defective Paint" is defined as paint that is "cracking, scaling, chipping, peeling or loose." 24 C.F.R. § 882.109(I)(2). Thus, in order to be "defective," paint need not be lead-based. Therefore, because it only applies to defective paint (which is not necessarily lead-based), subsection (3) does not create a duty to inspect for and remove lead-based paint.

Moreover, any duty that could be created by subsection (3) is inapplicable in this case. Subsection (3) only applies to units that were constructed prior to 1978 and which contain a family with a child under the age of seven years. PHA concedes that the apartment was constructed prior to 1978, and that the Section 8 family that lived in the apartment prior to the Plaintiffs included a child under the age of seven. Under this regulation, if defective paint is found during an inspection by PHA, the landlord may have to remove or cover the paint in order to remain in the Section 8 program. See 24 C.F.R. 882.109(I)(3); 24 C.F.R. 35.24(b). Despite the discovery that the Plaintiffs were permitted regarding this issue, they have produced no evidence that any defective paint existed in the apartment during the time it was inhabited by a Section 8 tenant. Therefore, even

if subsection (3) could theoretically give rise to a duty owed by PHA to have lead-based paint removed, it does not do so in this case.

Subsection (4) is more specific in its requirements.

It provides, in part:

(4)Chewable surfaces. In the case of a unit constructed prior to 1978, for a Family which includes a child under the age of seven years with an identified EBL [elevated blood lead level] condition, the initial inspection under § 882.209(h)(1), or a periodic inspection under § 882.211(b), shall include a test for lead-based paint on chewable surfaces Where lead-based paint on chewable surfaces is identified, covering or removal of the paint surface in accordance with 24 C.F.R. 35.24(b)(2)(ii) shall be required in accordance with § 882.209(h) or § 882.211(b) and (c), as appropriate.

24 C.F.R. § 882.109(I)(4). In addition to the requirements in subsection (3) that the unit was constructed prior to 1978 and that the tenants include a child under the age of seven, this subsection can only apply if the child under the age of seven has an identified EBL condition. In the event that all three of these requirements are met, PHA's inspections must include "a test for lead-based paint on chewable surfaces." "Chewable surfaces" are defined as "[a]ll chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodworks." 24 C.F.R. § 882.109(I)(2). In the event that lead-based paint is identified on a chewable surface,

PHA must require covering or removal of the paint surface.

But this subsection also does not give rise to a duty owed by PHA to the Plaintiffs. PHA concedes, as under subsection (3), that the unit was constructed prior to 1978, and that the Section 8 family previously residing in the unit included a child under the age of seven. But, despite the discovery permitted the Plaintiffs, they have failed to produce any evidence that there was a child in a Section 8 family with an identified EBL condition residing in the unit. PHA, in contrast, has produced evidence indicating that the child previously residing in the unit did not have an identified EBL condition. (See PHA's Mot. for Summ. J. Ex. 1.) In the absence of a child under seven with an EBL condition, PHA had no obligation to test for lead-based paint in the unit.

In summary, the Plaintiffs have been unable to establish that PHA owed a duty to them. Because the Plaintiffs were not themselves Section 8 tenants, it is doubtful that PHA was under any duty to them. But if the regulations promulgated pursuant to the LPPPA do impose upon PHA a duty to tenants who live in a unit after a Section 8 tenant vacates, the Plaintiffs have been unable to establish that such a duty arose in this case. Therefore, summary judgment will be entered in favor of PHA, dismissing Counts I-III of the Amended Complaint. This Court declines to exercise supplemental jurisdiction over the

remaining claims, all of which are based upon state law. See 28 U.S.C. § 1367(c)(3). The remaining claims are dismissed without prejudice to the Plaintiffs' right to re-file in state court. See Puricelli v. Borough of Morrisville, 820 F. Supp. 908, 920 (E.D. Pa. 1993), aff'd, 26 F.3d 123 (1994), cert. denied, 513 U.S. 930 (1994).

An appropriate Order follows.

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	:	
PHILADELPHIA HOUSING AUTHORITY,	:	
et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 3rd day of December, 1998, upon consideration of Defendant Philadelphia Housing Authority's Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that:

1. Defendant Philadelphia Housing Authority's Motion is GRANTED;
2. Claims against all other Defendants are dismissed as set forth in the above Memorandum;
3. All other outstanding Motions are DENIED as moot;

BY THE COURT:

Robert F. Kelly, J.