19-P-1542 Appeals Court

RYAN RODRIGUEZ NAVARRO[1] vs. DAVID A. BURGESS[2] & another.[3]

No. 19-P-1542.

Hampden. January 14, 2021. – April 13, 2021.

Present: Wolohojian, Henry, & Singh, JJ.

Lead Poisoning. Negligence, Safety inspection. Consumer Protection Act, Pleading. Practice, Civil, Motion to dismiss, Consumer protection case.

Civil action commenced in the Western Division of the Housing Court Department on September 7, 2018.

A motion to dismiss was heard by Dina E. Fein, J., and a motion for reconsideration was considered by her.

Jeffrey M. Feuer for the plaintiff.
Jeffrey J. Trapani for the defendants.

[1] By his mother and next friend, Gloryvee Navarro.

[2] Doing business as Emerald Lead Testing Company.

[3] Emerald Investments Ltd., doing business as Emerald Lead Testing Company.

WOLOHOJIAN, J. At issue is whether the minor plaintiff has asserted viable claims of negligence and violation of G. L. c. 93A against the defendants, who performed a lead inspection of a property in which the plaintiff became a tenant more than twenty years after the inspection. We conclude that the complaint was properly dismissed because, as a matter of law, the defendants owed no duty to the plaintiff in the circumstances.

Background. Taken in the light most favorable to the plaintiff, the allegations of the complaint (together with the materials submitted and considered by the motion judge[4]) show the

[4] Ordinarily, we assess a motion to dismiss against the well-pleaded allegations of the complaint (which we accept as true) and the inferences that can be reasonably drawn from them in favor of the plaintiff. See, e.g., Foster v. Commissioner of Correction (No. 2), 484 Mass. 1059, 1059 (2020). In certain circumstances, matters outside the four corners of the complaint may be considered without converting the motion to one for summary judgment. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011), S.C., 466 Mass. 156 (2013). Here, the parties asked the judge to take into account factual materials (including affidavits) that were placed before the judge in connection with the plaintiff's motion for a writ of attachment and the defendant's opposition thereto. Because the judge took the materials into account when ruling on the motion to dismiss and the parties have waived any objection to the judge having done so, and because the parties ask us to take those same materials into consideration now on appeal, and because there appears to be no dispute regarding the pertinent facts contained in those materials -- but rather a dispute over their legal significance -- we will consider the same materials that were before the motion judge. We have considered whether doing do requires application of the summary judgment standard rather than that for a motion to dismiss. Under either standard, we would reach the same result.

following. In May 2015, the minor plaintiff (then an infant) and his family became tenants at 39 Maynard Street, apartment 2R, in Springfield. In renting the apartment to the plaintiff's family, the owner (2015 owner) relied on a lead inspection performed by defendant Burgess (a Massachusetts licensed lead inspector), in April 1993.[5] Burgess had been hired to perform the inspection by an earlier owner of the property (1993 owner). At some point, the 1993 owner subsequently sold the property; it thereafter changed hands several more times before ultimately coming into the possession of the 2015 owner.

Burgess, as president of the defendant Emerald Investments Ltd. (corporation),[6] signed a "Letter of Initial Lead Inspection Compliance" (initial compliance letter) reflecting the results of his 1993 inspection.[7] The initial compliance letter stated:

> "This letter is to certify that I inspected your property located at 39 Maynard Street, 2nd floor right [a]partment, and relevant common areas, in the [c]ity of Springfield, Massachusetts, for dangerous levels of lead according to 105 [Code Mass. Regs. §] 460.730(A) through (F): Procedures For Initial Inspection For Lead Poisoning

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[5] Although the complaint alleges that Burgess performed the inspection at the request of the 2015 owner, the plaintiff acknowledges now that that allegation is not correct.

[6] Burgess is the president and sole shareholder of Emerald Investments Ltd., and has always acted as Emerald Investments doing business as Emerald Lead Testing Company.

[7] Although the letter is not dated, it is undisputed that it was written in connection with the 1993 inspection -- not at some later point in time.

> Prevention and Control, and determined that there were no violations. The inspection was conducted on April 19, 1993.
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> "Please be advised that Massachusetts Law requires that only certain residential surfaces be free of lead paint. Thus, this letter does not mean that your property contains no lead paint. The premises or dwelling unit and relevant common areas shall remain in compliance only as long as there continues to be no peeling, chipping, or flaking lead paint or other accessible materials and as long as coverings forming an effective barrier over such paint and materials remain in place."

Burgess's only contact with the property was the one occasion when he inspected the apartment on April 19, 1993; he has performed no inspections there since then, and has not otherwise had any connection to the property.

As noted above, the apartment was rented by the 2015 owner to the plaintiff's family in 2015. In August 2017, after the plaintiff began to experience symptoms consistent with lead poisoning, the apartment was inspected by an inspector with the Massachusetts Department of Public Health, who found elevated and dangerous levels of lead. The plaintiff's medical expert is of the view that the plaintiff suffered moderately severe lead poisoning as a result, and that the plaintiff will be adversely affected throughout his life.

The plaintiff's two-count complaint alleged negligence and violation of G. L. c. 93A based on the facts we have recited above. As to negligence, the plaintiff alleged that Burgess knew or should have known that children under the age of six

would reside in the apartment, that Burgess was required to perform his duties as a licensed lead inspector with due care and in accordance with applicable safety standards, and that Burgess negligently issued the initial compliance letter. The complaint does not explicitly allege that Burgess owed a duty to the plaintiff. As to G. L. c. 93A, the complaint asserts simply that the statute was violated, that the violation was knowing and willful, and that Burgess failed to make a reasonable written offer of relief in response to the plaintiff's pre-litigation demand letter. The complaint does not allege any unfair or deceptive act.

In response, the defendants filed a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for failure to state a claim upon which relief may be granted.[8] The judge conducted a nonevidentiary hearing on the motion, which she then allowed in a thoughtful written memorandum explaining the bases for her decision. In essence, the judge concluded that Burgess owed no duty to the plaintiff, who became a tenant in the

[8] In addition to arguing that Burgess had no duty, the defendants also argued that Burgess could not be held personally liable given that he acted only in his capacity as an officer of the corporation, and that the complaint failed to allege any causal connection between the defendants' conduct and the plaintiff's harm. In light of our disposition, we do not reach either of these arguments. The defendants did not argue below, nor do they argue now, that the statute of repose, G. L. c. 260, § 2B, applies.

apartment more than twenty years after the inspection. Accordingly, judgment entered dismissing the complaint. The judge subsequently denied the plaintiff's motion for reconsideration.

Discussion. "To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Jupin v. Kask, 447 Mass. 141, 146 (2006). The last three of these are fact-dependent inquiries that are ordinarily left to a jury to decide. Id. But the existence of a duty is a question of law. Id. See Aulson v. Stone, 97 Mass. App. Ct. 702, 705 (2020); Pantazis v. Mack Trucks, Inc., 92 Mass. App. Ct. 477, 483 (2017). "If no such duty exists, a claim of negligence cannot be brought." Remy v. MacDonald, 440 Mass. 675, 677 (2004). See Davis v. Westwood Group, 420 Mass. 739, 742-743 (1995) ("Before liability for negligence can be imposed, there must first be a legal duty owed by the defendant to the plaintiff").

"[C]ourts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." Luoni v. Berube, 431 Mass. 729, 735 (2000), quoting W.L. Prosser & W.P. Keeton, Torts § 53, at 358-359 (5th ed. 1984). "A duty finds its 'source in existing social values and customs,' and thus

'imposition of a duty generally responds to changed social conditions'" (citations omitted). Jupin, 447 Mass. at 146-147. "[A]s a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others" (quotations and footnote omitted). Id. at 147, citing Remy v. MacDonald, 440 Mass. at 677. "A precondition to this duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor." Jupin, supra. See Helfman v. Northeastern Univ., 485 Mass. 308, 319 (2020); Correa v. Schoeck, 479 Mass. 686, 698 (2018).

We apply these principles to the allegations in this case. It is plain that Burgess had a duty to the 1993 owner who hired him to inspect the premises with the requisite level of care. That duty arose from the contractual relationship between the 1993 owner and Burgess, similar to the duty that arises between other trained professionals and their clients. See, e.g., Miller v. Mooney, 431 Mass. 57, 60-61 (2000) (attorney-client). However, the duty that arises from such a contractual relationship does not ordinarily extend to a nonclient unless the professional knows that the nonclient will rely on the services rendered, or that it is reasonably foreseeable the nonclient would do so. See Craig v. Everett M. Brooks Co., 351 Mass. 497, 501 (1967) (civil engineering firm); Meridian at Windchime, Inc. v. Earth Tech, Inc., 81 Mass. App. Ct. 128, 133

(2012) (same). Here, there is no allegation that Burgess knew the plaintiff would become a tenant of the premises more than twenty years after the inspection, or that he knew the plaintiff would rely on Burgess's decades-old initial compliance letter. Thus, the question is whether it was reasonably foreseeable to Burgess that a tenant so remote in time from the inspection would so rely. Meridian at Windchime, Inc., supra. This is an objective standard. Id.

For several reasons, the answer to this question is "no." To begin with, as we have noted above, Burgess provided the initial compliance letter only to the 1993 owner. There is nothing to suggest that Burgess knew to whom the premises were rented in 1993 when he performed his inspection, let alone to whom they would be rented in the decades thereafter. Nor is there anything to suggest that Burgess intended the initial compliance letter to be provided to, or relied upon by, the several subsequent owners of the property or future tenants of those owners. Second, the initial compliance letter made clear that Burgess was not certifying that the premises were free of lead; Burgess provided neither a guaranty nor a warranty. Instead, the initial compliance letter reflected only the condition of certain surfaces in the apartment on the day of inspection, and made clear that future changes such as peeling, chipping, or flaking lead paint or other accessible materials

could affect the conclusions of the inspection. It is unreasonable to read Burgess's initial compliance letter to mean that the apartment would be free of lead in the distant future; concomitantly, it was not reasonably foreseeable that the plaintiff (or the 2015 owner) would rely on the initial compliance letter for that purpose. Cf. Christopher v. Duffy, 28 Mass. App. Ct. 780, 784 (1990) (noting impediments to proving liability for lead poisoning where there had been a significant lapse of time). Third, neither the apartment, nor its condition, was under Burgess's control; he had no ongoing relationship with the premises. In fact, he had no contact with the premises apart from the single inspection he performed in 1993. This is not a case where "a duty of care may arise from the right to control land, even where the person held to such a duty does not own the land in question." Halbach v. Normandy Real Estate Partners, 90 Mass. App. Ct. 669, 673 (2016), quoting Davis v. Westwood Group, 420 Mass. 739, 744-745 (1995). See Marston v. Boston Pub. Co., 271 Mass. 307, 310-311 (1930). Fourth, for similar reasons, no "special relationship" existed between Burgess and distant future tenants of the apartment. See Williams v. Steward Health Care Sys., LLC, 480 Mass. 286, 296 (2018).

"When considering whether to recognize a duty, we consider any acts of the Legislature relevant to the issue in question."

Williams, 480 Mass. at 291. For this reason, although the plaintiff does not assert a claim under the lead poisoning prevention laws of G. L. c. 111, §§ 189A-199B, and associated regulations in 105 Code Mass. Regs. §§ 460.000 (2017), we have taken them into account in evaluating whether Burgess had a common-law duty to the minor plaintiff in the circumstances presented here.

In enacting the lead poisoning prevention laws, the Legislature was concerned with protecting children under the age of six, such as the plaintiff, from the serious health hazards lead paint can cause them. See Commonwealth v. Racine, 372 Mass. 631, 638-639 (1977). The statutes impose strict liability on owners -- as defined[9] -- of residential property for damage caused by their failure to perform their obligations under the statute. See Bencosme v. Kokoras, 400 Mass. 40, 41 (1987); Bellemare v. Clermont, 69 Mass. App. Ct. 566, 569 (2007). Liability to a tenant is not imposed on other persons or

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[9] An owner is

> "any person who alone or jointly or severally with others (i) has legal title to any premises; [or] (ii) has charge of control of any premises as an agent who has authority to expend money for compliance with the state sanitary code, executor, administrator, trustee or guardian of the estate or the holder of legal title."

G. L. c. 111, § 189A.

entities unless they have entered into a contract with the tenant in which they have voluntarily undertaken to inspect for the presence of lead pursuant either to State or Federal law. See Campbell v. Boston Hous. Auth., 443 Mass. 574 (2005); Barnes v. Metropolitan Hous. Assistance Program, 425 Mass. 79 (1997); Ayala v. Boston Hous. Auth., 404 Mass. 689 (1989). To the extent that others, such as "negligent building inspectors, lead-based paint manufacturers, and paint removal contractors" are potentially at fault, their liability derives from that of the property owner; in other words, the owner may have a right of contribution against them, but the statute does not provide a tenant with a direct cause of action against them.[10] Ankiewicz v. Kinder, 408 Mass. 792, 796 (1990). Thus, our conclusion that no common-law duty runs from Burgess to the plaintiff, who became a tenant after several changes of ownership and twenty years after the inspection, is consistent with the judgments of the Legislature as they are reflected in the statutory scheme.

Finally, we see no error in the dismissal of the plaintiff's claim under G. L. c. 93A, which rests solely on Burgess's alleged negligence in inspecting the apartment and issuing the initial compliance letter, and not on any alleged

[10] Here, for whatever reason, the plaintiff has not named as a defendant the 2015 owner, the 1993 owner, nor any owner in between. Thus, the ability to seek contribution from Burgess is not at issue.

unfair or deceptive act or practice. "A negligent act standing by itself does not give rise to a claim under c. 93A. There must in addition be evidence that the negligence was or resulted in an unfair or deceptive act or practice." Squeri v. McCarrick, 32 Mass. App. Ct. 203, 207 (1992). Moreover, for the reasons we have already explained, the negligence claim fails as a matter of law because Burgess had no duty to the plaintiff. See Underwood v. Risman, 414 Mass. 96, 100-101 (1993) (no G. L. c. 93A liability for alleged failure to disclose presence of lead paint where defendant had no duty to make such disclosure under G. L. c. 111).

We accordingly affirm the judgment dismissing the complaint and the order denying the motion for reconsideration. The plaintiff's request for appellate attorney's fees and costs is denied.

Judgment affirmed.