THE CRYSTAL BALL AND MOLD LITIGATION - - 2012

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OUTLINE OF ORAL PRESENTATION

I. Dynamics of Mold Litigation – The Backstory
   A. The Landlord-Tenant Motivation
   B. Plaintiff's Counsel and How Paid
   C. Attorneys' Fee Provisions

II. Frye and Daubert
   A. Summary Judgment
   B. *Frye/Daubert* Hearing

III. The Future of Mold Litigation: *Fraser, Cornell*
   A. Changes in the Case Law of Mold-Related Illness
   B. Changes in the Science of Mold-Related Illness
   C. The Gatekeeper has Opened the Gate

MOLD CLAIMS: PREDICTING THE OPEN GATE

Introduction

The number of negligence lawsuits in New York State arising out of the existence and growth of mold has never been significant; some recent case law, however, may now portend an increase in these suits.

Although a plaintiff's claim in a mold case usually includes property damage and contractual damages under a lease agreement (relocation expenses, rent abatement, and attorneys fees), the 'money maker' from the perspective of the plaintiffs' bar is the bodily injury component.

Bodily Injury as a Result of Exposure to Mold

The typical mold plaintiff who alleges bodily injury generally asserts that indoor residential mold in his/her apartment caused a host of illnesses, usually respiratory. There seems to be little general acceptance in the medical community that, at least in non-immuno compromised individuals, causation exists between indoor residential mold and bodily injury.

One New York court held that the lack of demonstrated general acceptance in the medical community meant that a mold plaintiff's bodily injury claim *had* to fail. Another, more recent case, has emphasized that the decision to preclude a mold claim for lack of acceptance in the medical community is resolved on a case by case basis.

The law on mold causation in New York is therefore unsettled at the moment, with the State's highest Court not yet having weighed in on the issue. Prudence dictates that until the definitive resolution of the issue, owners, landlords, agents, and their carriers and counsel should continue to make the "lack of general acceptance" argument as one part of the defense of these lawsuits.

The Slowly Shifting View of the Medical Community

In late 2005, the American Academy of Allergy, Asthma and Immunology published a position paper stating in substance that there was a consensus of medical thought that no causation had been established between mold and illness in non-immuno

compromised individuals. That position was re-stated in the Fall of 2011 in a paper published by the American College of Occupational and Environmental Medicine.

A significant corpus of foreign literature, however, and a growing number of local treatises and research, takes issue with those pronouncements. There is lively debate as to whether courts should take heed of the thoughts and research of medical communities in, e.g., Europe or Asia.

Plaintiffs' Bar

There is at present a relatively small pool of attorneys who claim to specialize in plaintiffs' mold cases, likely because of (1) the unsettled state of the medicine, (2) the need for an allergic or immuno-compromised plaintiff, (3) the near certainty of a Frye/Daubert hearing, and (4) the sometimes *de minimis* settlement value of the case.

The recent *Cornell* decision, however, may serve as a lure to the plaintiff's bar to dip into the waters of these claims.

RELEVANT CASELAW RELATED TO MOLD LAWSUITS

ADMISSIBILITY OF EXPERT TESTIMONY

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)(polygraph test results excluded because test had not gained general acceptance among authorities in fields of physiology and psychology)

Daubert v. Merrell, 509 U.S. 579 (1993)(to be admissible, expert testimony must be reliable, for which a number of factors – including general acceptance – are to be considered)

Cornell v 360 W. 51st St. Realty, LLC, 939 N.Y.S.2d 434 (1st Dep't 2012)(dismissal of mold related injuries under *Frye* is a case by case inquiry)

People v. Wesley, 83 N.Y.2d 417, 436 (1994)(In addition to passing muster under *Frye* (general causation), expert testimony must also have proper foundation (specific causation))

Parker v. Mobil Oil, 7 N.Y.3d 434 (2006)(plaintiff exposed to benzene turned away for failure to prove specific causation)

Nonnon v. City, 819 N.Y.S.2d 705 (1st Dept. 2006)(plaintiffs' epidemiological studies involving the Pelham Bay landfill were not novel science, and therefore did not require *Frye* hearing)(affirmed on procedural grounds only in the Court of Appeals)

Fraser v. 301-52 Townhouse, 831 N.Y.S.2d 347 (2006)(mold plaintiff turned away after *Frye* hearing; no general acceptance that indoor mold causes plaintiffs' respiratory ailments)

Lebouef v. Safeguard, 851 NYS2d 70 (West. Cty 2007)(mold plaintiff fails to satisfy causation element in bodily injury claim).

BTN v. Auburn School District, 845 N.Y.S.2d 614 (4th Dept. 2007)(issue of mold causing illness should go to jury)

Marso v. Novak, 840 N.Y.S.2d 53 (1st Dept. 2007)(differential diagnosis not generally accepted if it leads to a conclusion that is not generally accepted (discussing *Nonnon*)).

PROVING NEGLIGENCE

Litwack v. Plaza Realty, 2007 NY Slip Op 3834 (May 3, 2007)(landlord's notice of brown spot on wall and surrounding wetness held not to be notice of mold condition that allegedly caused tenant's injuries)(presently on appeal to the Court of Appeals)

Lark v. DeMatteis, 48 A.D.3d 354 (1st Dept. 2008)(leak in plaintiff's closet that landlord fixed within a week held not to be notice of a mold condition that allegedly caused tenant's injuries)

CONSOLIDATION

Carroll v. Nostra Realty, 2005 NY Misc. LEXIS 3307 (general standard for consolidating summary proceeding and tort case)

Amtorg Trading v. Broadway, 191 A.D.2d (1st Dept. 1993)(standard for consolidation of summary proceeding and action)

SPOLIATION

Bannon v. Auerbach, 785 N.Y.S.2d 650 (2004)(spoliation remedies not awarded)

Bouzo v. Citibank, NA, 96 F.3d 51, (2d Cir. 1996)

Mudge, Rose v. Penguin Air Conditioning, 633 N.Y.S.2d 493, 221 A.D.2d 243 (1st Dept. 1995)

JURY WAIVER

Tanne v. Tanne, 30 A.D.2d 956, 294 N.Y.S.2d 247 (1st Dept. 1968)(plaintiff's right to trial on his legal action had been waived because equitable and legal claims had been consolidated, such claims arose from the same facts, and the plaintiff acquiesced to the Court's consolidation)

Trepuk v. Frank, 104 A.D.2d 780, 480 N.Y.S.2d 889 (1st Dept. 1984)

Meltzer v. Lincoln Square Apartments, 135 Misc. 2d 315, 515 N.Y.S.2d 208 (NY County 1987)

LIMITATIONS

Martin v. 159 West 80 Street Corp., 3 A.D.3d 439, 770 N.Y.S. 2d 720 (1st Dept. 2004)(CPLR 214-c – limitations period is 3 years from injuries)

Felice v. Amer. NWS Corp., 46 A.D.3d 505 (2d Dept. 2007)(defendant permitted under CPLR 214-c to prove facts showing that plaintiff could have discovered injuries earlier)

Kaymakcian v. Board of Managers of Charles House Condominium. 2008 Slip Op. 02487 (1st Dept. 2008)(where tort was continuing, plaintiff was not barred by statute of limitations, but may seek damages only three years back)