

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KHADIDATOU SYLLA-BA,

Plaintiff,

-against-

Index No. 151207/2013

DECISION/ORDER

THE COLTON CONDOMINIUM CORPORATION
d/b/a THE COLTON CONDOMINIUM, SLJ
MANAGEMENT LLC and LAWRENCE
ENVIRONMENTAL GROUP, LLC

Defendants.
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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Khadidiatou Sylla-ba commenced the instant action seeking to recover for damages stemming from alleged leaks and mold within plaintiff's apartment. Defendants The Colton Condominium Corporation d/b/a The Colton Condominium ("The Colton") and SLJ Management LLC ("SLJ") (hereinafter collectively referred to as the "moving defendants") now move for an Order (1) granting them summary judgment dismissing plaintiff's personal injury claims; and (2) dismissing plaintiff's property damage claims on spoliation grounds. The action has been dismissed as against Lawrence Environmental Group, LLC ("Lawrence"). For the

reasons set forth below, the moving defendants' motion is granted.

The relevant facts are as follows. Plaintiff resides in Unit 6B-D in the building located at 76-15 35th Avenue, Queens, New York (the "Apartment"), which is owned and operated by the moving defendants. Plaintiff alleges that starting in or around December 2010, water began leaking into her bedroom in the Apartment, which caused mold to develop and that plaintiff became sick and had to move out of her bedroom. Plaintiff also alleges that the dampness and mold damaged her personal property.

After plaintiff notified the moving defendants about the alleged mold in the Apartment, SLJ inspected the Apartment and removed a piece of the wooden floor in the bedroom and saw mold. In or around May 2012, SLJ hired non-party Prime Aire Mold Services, Inc. ("Prime") to inspect the Apartment for mold. Upon discovering the presence of mold, on or about May 16, 2012, Prime undertook remediation work to remove the mold. Thereafter, Prime inspected the Apartment and concluded that the "mold remediation treatment process was performed successfully" and "[c]learance testing performed confirmed the proper elimination of mold, revealing the lowest possible spore count from the air sample taken from the bedroom." The moving defendants also hired other entities to test for and remediate mold in the Apartment.

In or around August 2012, SLJ retained Lawrence to conduct a "Mold/Moisture Intrusion Survey" in plaintiff's apartment. According to Lawrence's survey report: "The purpose of the survey was to identify the extent of water damage and potential mold growth associated with a water intrusion event into the apartment's southwest bedroom." Upon surveying the apartment, Lawrence concluded that: "No mold growth was observed on any surfaces in the southwest bedroom and all surfaces were found to be dry when tested with the moisture meter. [and n]o

active water intrusion was occurring at the time of the survey.”

On or about February 7, 2013, plaintiff commenced the instant action to recover damages stemming from the alleged mold infestation in her apartment. Specifically, plaintiff’s bill of particulars asserts that as a result of the moving defendants’ negligence in failing to remediate the mold in a timely manner, plaintiff suffered damage to her property and personal injuries in that she “has continuous coughing, has been required to seek medical care and attention, and will be required to do so in the future; plaintiff has become partially disabled; mental anguish and distress; emotional distress.” Plaintiff further alleges that as a result of the moving defendants’ negligence, she has suffered congestion, respiratory problems, bronchitis, asthma, upper and lower airway irritations, mold allergy, inhalant allergies to mold, mold allergy/hypersensitivity, shortness of breath, breathing problems, exertional dyspnea and cough, chest pain and flulike systems.

The court first turns to that portion of the moving defendants’ motion for summary judgment dismissing plaintiff’s personal injury claims. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

Under New York law, “[t]o sustain a claim for negligence, a plaintiff must show that the

defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate result of that breach.” *Solomon v. City of New York*, 66 N.Y.2d 1026 (1985). In toxic exposure cases, such as this one, it is well-settled that “an opinion on causation should set forth a plaintiff’s exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation).” *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 783-84 (2014), citing *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006). Indeed, the Court of Appeals explained that it is “plaintiff’s burden to establish sufficient exposure to a substance to cause the claimed adverse health effect.” *Cornell*, 22 N.Y.3d at 784.

In *Cornell*, a case nearly identical to the instant case, the defendant landlord moved for summary judgment dismissing the plaintiff’s personal injury claims which were based on her alleged exposure to mold in her apartment and building in which she resided. The Court of Appeals found that the personal injury claims should have been dismissed as against the landlord on the ground that the plaintiff could not prove either general or specific causation with regard to the mold and her alleged injuries. Initially, the Court of Appeals found that the landlord had made a *prima facie* case that there was no general causation between the mold at issue and the symptoms alleged by the plaintiff, explaining as follows:

Dr. Phillips [the defendants’ expert] in his affidavit opined that it is generally accepted within the relevant community of scientists (i.e., allergists, immunologists, occupational and environmental health physicians) that exposure to mold causes human disease in three ways: an immune response in allergic individuals (hypersensitivity pneumonitis), direct infection by an organism (e.g., athlete’s foot) and ingestion of mycotoxins⁵ (a⁶ toxic substance produced by a fungus) in large doses from spoiled food. He cited studies in

particular, the AAAAI report, to support his depiction of the state of the science. And although [plaintiff] claims to suffer from various respiratory illnesses, hypersensitivity pneumonitis is not one of them. With [defendant] having made its prima facie showing, the burden then shifted to [plaintiff] to raise a triable issue of fact with respect to general causation. *Cornell*, 22 N.Y.3d at 781-82.

The Court of Appeals further held that the plaintiff failed to raise an issue of fact as to general causation. In plaintiff's attempt to raise an issue of fact, she provided the affidavit and report of Dr. Eckardt Johanning, a doctor of environmental and occupational medicine. Specifically, Dr. Johanning attempted to raise an issue of fact by "rel[ying] on various studies or reports...to support the proposition that his theory of general causation enjoyed general scientific acceptance." However, the Court of Appeals held that the reports and studies relied upon by Dr. Johanning failed to raise an issue of fact as to general causation as they "speak in terms of 'risk' and 'linkage' and 'association' – not causation." *Cornell*, 22 N.Y.3d at 782-83, quoting *Parker*, 7 N.Y.3d at 450. The Court of Appeals explained that merely showing an association between indoor mold and the medical conditions alleged by the plaintiff is insufficient and that in order to raise an issue of fact, Dr. Johanning had to "establish that the relevant scientific community generally accepts that molds *cause* these adverse health effects." *Cornell*, 22 N.Y.3d at 783. Additionally, Dr. Johanning attempted to raise an issue of fact by "attack[ing] [defendant's doctor's] qualifications and the soundness of the scientific authorities undergirding his opinion on general causation." However, the Court of Appeals found such attempt unsuccessful, stating that "[the defendant's expert doctor] is, by any measure, clearly competent to render an opinion about the possible adverse health effects in humans of indoor exposure to molds." *Id.* at 782. Further, the Court of Appeals noted that "[Dr. Johanning] did not...claim that [the American Academy of Allergy, Asthma and Immunology (AAAAI) report relied upon by defendant's

expert doctor] has ever been withdrawn, or indicate where its conclusions were ever repudiated by the scientific community or have been superseded, or suggest that the [report] is not reputable.” *Id.* Finally, Dr. Johanning attempted to raise an issue of fact by “point[ing] out that government reports and public health initiatives treat mold in damp indoor environments as a public health concern” and relying on guidelines and recommended precautions issued by government agencies to safeguard against the risk of harm from indoor mold exposure. However, the Court of Appeals found such attempt unsuccessful based on the well-settled law that “standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.” *Id.*, quoting *Parker*, 7 N.Y.3d at 450.

Moreover, the Court of Appeals held that even if the plaintiff in *Cornell* had demonstrated general causation, which she had not, she failed to show specific causation, explaining as follows:

Here, Dr. Johanning did not identify the specific disease-causing agent to which [plaintiff] was allegedly exposed other than to vaguely describe it as ‘an unusual mixture of atypical microbial contaminants.’ He made no effort to quantify her level of exposure...[nor did he] respond to, much less refute, [defendant’s expert doctor’s] statement that the molds in [plaintiff’s] former apartment were ‘of expected level and distribution for any average home’ when compared to sampling studies. *Cornell*, 22 N.Y.3d at 783-84.

In the instant action, that portion of the moving defendants’ motion for summary judgment dismissing plaintiff’s personal injury claims is granted. As an initial matter, as in *Cornell*, defendants have established their *prima facie* right to summary judgment as they have shown a lack of general causation between plaintiff’s claimed injuries and the alleged mold exposure. The moving defendants have submitted the medical affirmation of Dr. Stuart Young,

an allergist, who concluded that there is no current updated scientific data or updated medical trials that support the claim that indoor residential mold can cause the ailments claimed by plaintiff and that such theory is not generally accepted by the medical community. Dr. Young referenced and cited to multiple scientific articles and papers, including, *inter alia*, the position paper of the AAAAI, entitled *Environmental And Occupational Respiratory Disorders: The Medical Effects of Mold Exposure*, the same paper cited to by the defendant's expert in *Cornell*, which states that "currently available studies do not conclusively prove that exposure to outdoor airborne molds plays a role in allergic rhinitis, and the studies on the contribution of indoor molds to upper airway allergy are even less compelling." Dr. Young also examined plaintiff on two occasions, reviewed her medical reports and the environmental reports related to the Apartment and concluded as follows:

On the basis of all of the above records and documents and my physical exam I can conclude with a reasonable degree of medical certainty that Mrs. Sylla-Ba's diagnoses are a nonspecific cough which has no relationship to the alleged mold in the[] apartment. The nonspecific cough is more likely caused by the smoking of cigarettes in the past.

Additionally, the moving defendants have submitted the medical affirmation of Dr. Jack Adler, a pulmonologist, who also concluded that there is a lack of general causation between the mold condition in the Apartment and the ailments alleged by plaintiff. Similar to Dr. Young, Dr. Adler examined plaintiff, tested plaintiff's blood for allergies or immune response to fungi, reviewed her medical records and the environmental reports related to the Apartment and concluded as follows:

At the present time I found no evidence that Ms. Sylla-Ba has significant pulmonary disease. On both occasions when I examined her, her lung examinations were entirely normal. Her

vital capacity on the first test was within normal limits; and on the second test was borderline normal in spite of her very poor cooperation...I find no evidence that Ms. Sylla-ba has any significant mold-related medical issues...there is no evidence presented that there is a significant mold contamination in [plaintiff's] apartment, what specific mold is present, and that Ms. Sylla-ba has any type of reaction to that mold. Thus, I find no evidence that Ms. Sylla-ba has any mold related asthma, allergy or lung disease.

Additionally, defendants have established their *prima facie* right to summary judgment as they have established a lack of specific causation between the mold at issue and the types of injuries plaintiff has alleged. Dr. Young has affirmed that his review of the environmental records relating to the Apartment indicates that while mold and moisture were found in the Apartment, the quantities were not significant enough to cause the ailments alleged by plaintiff. Dr. Young further noted that persons who have mold allergy have highly positive skin or blood tests to mold which is not demonstrated in plaintiff's records. Further, Dr. Adler found the level of fungal contamination in the Apartment to be minor from his review of the environmental records.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat the moving defendants' motion for summary judgment dismissing her personal injury claims. As an initial matter, plaintiff has failed to raise an issue of fact with regard to general causation. Plaintiff has provided the medical affirmation of Dr. Johanning, the same expert doctor used by the plaintiff in *Cornell*, who examined the plaintiff and reviewed her medical records and the environmental reports regarding the Apartment. With regard to general causation, Dr. Johanning concluded as follows:

Based on the provided history, documents and initial findings, and a differential diagnostic methodology my preliminary conclusions

with a reasonable degree of medical certainty are that Ms. Sylla-Ba appeared to have suffered from the effects of upper and lower airway irritations and mold allergy/hypersensitivity caused or aggravated by her exposure to unsanitary conditions at her apartment with water damage and atypical mold findings.

Dr. Johanning cites to a long list of articles purportedly supporting his opinion of general causation between indoor mold and the types of ailments complained of by plaintiff. However, as the Court of Appeals found in *Cornell*, none of said articles stand for such a proposition. Rather, the articles, at most, merely show an “association” between mold exposure and the symptoms claimed by plaintiff. However, a mere “association” between mold and the symptoms claimed by plaintiff without actual “causation” is insufficient to raise an issue of fact as to general causation. *See Cornell*, 22 N.Y.3d at 782-83. Further, to the extent that Dr. Johanning relies on government reports and public health initiatives that treat mold in damp indoor environments as a public health concern and the guidelines and recommended precautions issued by public health agencies to safeguard against the risk of harm from indoor mold exposure as proof of general causation between indoor mold and the symptoms alleged by plaintiff, such reliance is misplaced. As the Court of Appeals has held, “standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.” *Parker*, 7 N.Y.3d at 434.

Additionally, plaintiff has failed to raise an issue of fact with regard to specific causation. As was the issue in *Cornell*, Dr. Johanning’s affirmation and affidavit fail to quantify the plaintiff’s exposure and fail to opine on what the threshold level of exposure would be that would lead to adverse health reactions. Indeed, to the extent Dr. Johanning relies on an environmental report discussing the different types of mold found in the Apartment, such

reliance is misplaced as the report does not show a quantifiable measurement as to the level of mold in plaintiff's Apartment but rather states that the indoor mold level at the plaintiff's Apartment was higher than outdoor mold level.

Further, this court finds that plaintiff's attempt to raise an issue of fact by attacking defendants' expert doctors' qualifications is unsuccessful. Specifically, as the plaintiff did in *Cornell*, plaintiff provides Dr. Johanning's affidavit in which he, *inter alia*, attacks Drs. Young and Adler's qualifications and the soundness of the scientific authorities on which the doctors based their opinions on general causation. However, any assertion by Dr. Johanning that Dr. Young is not qualified to opine on the general causation in this case merely because he has not published in the area of mold exposure is without merit as Dr. Young is a medical doctor certified in allergy and immunology and practiced for forty-six years specializing in allergies in adults and children and plaintiff has failed to establish that Dr. Young is incompetent to render an opinion about the possible adverse health effects in humans of indoor exposure to molds. Further, to the extent Dr. Johanning asserts that Dr. Young's affirmation should not be considered because it does not attach the medical records and mold testing records, such assertion is without merit as there is no requirement that a medical affirmation must annex all records the doctor has reviewed and plaintiff fails to cite any authority for such assertion.

To the extent plaintiff asserts that she is entitled to a *Frye* hearing, such assertion is without merit as plaintiff has failed to provide any basis for such assertion. Indeed, the court has determined that plaintiff failed to establish any causal connection between the mold in her Apartment and her claimed ailments. Thus, there is no basis for the court to conduct a *Frye* hearing.

The court next turns to that portion of the moving defendants' motion to dismiss plaintiff's property damage claims on spoliation grounds. "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept 2012). "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence." *Id.* at 45. This is because "a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense." *Squitieri v. City of New York*, 248 A.D.2d 201, 203 (1st Dept 1998). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product." *Id.* at 202 (1st Dept 1998)(internal citations omitted). The First Department has held that where the plaintiffs "disposed of the items they claim were damaged, thereby preventing defendants from challenging the validity and extent of those claims," the "[p]laintiffs should be precluded from offering evidence at trial as to loss of personal property." *Fraser v. 301-52 Townhouse Corp.*, 101 A.D.3d 628, 629 (1st Dept 2012).

In the instant action, the court finds that that portion of the moving defendants' motion to dismiss plaintiff's property damage claims on the basis of spoliation is granted. Plaintiff alleges that as a result of the water intrusion into the Apartment and the subsequent mold that formed, her clothing and other property was damaged. It is undisputed that plaintiff disposed of the

