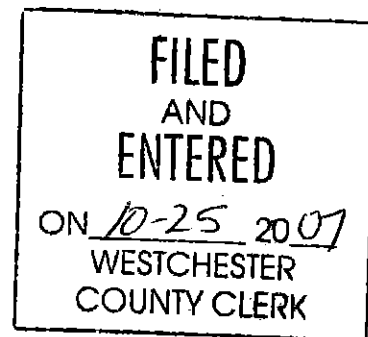


To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - CENTRAL CALENDAR PART

-----X
RICHARD LeBOEUF, DIANE LeBOEUF,
BRIAN LeBOEUF and LISA LeBOEUF

Plaintiffs,

SHORT FORM ORDER

-against-

Index No. 9202/04
Motion Date: Oct. 12, 2007

SAFEGUARD INSURANCE COMPANY,
ROYAL & SUN ALLIANCE,
CRYSTAL RESTORATION ENTERPRISES, INC. and
LEIGHTON ASSOCIATES, INC.,

Defendants.

-----X
NICOLAI, J.

The following papers numbered 1 to 79 were read on this motion in limine by defendant Crystal Restoration for an Order precluding the testimony of plaintiffs' purported experts as to medical causation, as well as the use of the environmental reports for establishing medical causation and for an Order granting Crystal Restoration's motion for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' complaint and all cross claims with prejudice; and cross motion by defendants Safeguard Insurance Company and Royal & Sunalliance for an Order granting summary judgment dismissing the complaint, or in the alternative, precluding plaintiffs' from introducing expert testimony relating to medical causation.

Notice of Motion - Affirmation	1- 2, 22-23
Notice of Cross Motion - Affirmation	26- 30
Answering Affirmation	45
Replying Affirmation	72, 73- 74
Exhibits	3- 21, 24- 25 31- 44, 46-71, 75-79

Upon the foregoing papers it is Ordered that the motion and cross motion are decided as follows:

This is a negligence action in which plaintiffs allege that they were exposed to “toxic mold and spores” discovered in their home located at 823 Webster Avenue, New Rochelle, New York (the “Premises”) after a broken water pipe caused flooding on June 17, 2002.¹ According to the complaint, flooding and its resulting damage is a covered loss under plaintiffs’ homeowners’ insurance policy with defendants Royal & Sun Alliance (“Royal”) and Safeguard Insurance Company (“Safeguard”).² Thereafter, Royal and Safeguard retained the services of defendants Crystal Restoration Enterprises, Inc. (“Crystal Restoration”) and Leighton Associates, Inc. (“Leighton”) to clean-up and repair the damage to the home and personal property contained therein. Plaintiffs allege that defendants’ failure to timely respond to the notification made by plaintiffs to defendants led to further damage; and as such, the premises became infested with mold and other organisms, known to be hazardous to human habitation.³

According to the affirmation of plaintiffs’ family physician, Dr. Frank M. Tamarin, the symptoms which began to manifest themselves following the 2002 flood included: red and itchy eyes, sore throats, headaches, breathing difficulties and flu-like symptoms. Based upon plaintiffs’ symptoms and complaints, as well as Richard LeBoeuf and Lisa LeBoeuf’s elevated Ige levels “indicating a sensitivity to allergies and a reduction in the function of the body’s immune system” Dr. Tamarin concluded that the LeBoeuf family’s physical complaints are “causally related to the mold and damp conditions found in their home...” In addition, according to James Rood, an environmental consultant who conducted the inspection and testing of the Premises on May 7, 2003, testing revealed the presence of fungi, including: Aureobasidium sp., Alternaria sp., Stachybotrys chartarum, Aspergillus fumigatus, Yeast, sp, Non Sporulating fungi, Paecilomyces variotti and Penicillium sp. In his Affidavit, Mr. Rood stated that many of the tests performed indicated that the overall level of mold was “low” but he concluded that the Premises was contaminated with mold and bacteria growth associated with the discharge of water from the broken bathroom pipe, and this infestation was exacerbated by the alleged actions of Crystal Restoration when they performed the “final” clean-up of the home.⁴

Crystal Restoration seeks an Order precluding the testimony of plaintiffs’ purported experts as to medical causation, as well as the use of the environmental reports for establishing medical causation and for an Order granting summary judgment upon the grounds that there is no evidence beyond mere speculation that plaintiffs’ exposure to “toxic mold” resulted in their injuries. In support of their motions, defendants tendered, inter alia, the affidavit of Chester

¹It is undisputed that plaintiffs vacated the premises from July 2003 until approximately October 2005.

²Defendant Safeguard is a related company to Royal and the two companies are essentially the same for all purposes herein.

³The property damage aspect of this action has been settled by Royal.

⁴Toxicologist Dr. Harriet M. Amman’s opinions are not specifically related to this case.

Clark, M.D., M.P.H., M.A. who opined that there is no evidence that the multitude of symptoms alleged by the four members of the LeBoeuf family are caused by mold allergy in that only one member of the family has a mild allergy to a common outside mold. Based upon a review of the medical complaints that have been alleged to have been caused by indoor exposure to mold, a review of plaintiffs' medical histories including the independent medical reports, a review of the reports of environmental testing performed at the Premises, a review of the medical and epidemiological literature to identify the state of the science with regard to the health effects of indoor exposure to mold, a review of the affidavits of Frank Tamarin, M.D. and James Rood, Dr. Clark avers that the LeBoeufs continued to have similar episodic complaints three years after they left the Premises. According to Dr. Clark, given the absence of continued exposure, the pathophysiological basis for such complaints, lacks any medical foundation or credibility. Dr. Clark concluded that based upon a comprehensive review of the literature by the Institute of Medicine ("IOM"), as requested by the Centers for Disease Control and Prevention, "the current state of the scientific literature is that there are no symptoms or diseases that have been shown to be caused by indoor exposure to mold."⁵

To establish a relationship between an individual's illness and a toxin suspected of causing that illness, a plaintiff must establish (1) the level of exposure to the toxin, (2) that the toxin is capable of causing the alleged illness and the level of exposure to the toxin that will engender that illness, and (3) the probability that the toxin caused the injuries. The third prong necessitates evaluating and weighing the possibility of other causes of plaintiff's illness. This three-step process is a methodology that is scientifically reliable and recommended by the World Health Organization and the National Academy of Sciences for establishing a causal connection between an individual's illness and a toxin believed to have caused that illness (see Parker v Mobil Oil Corp., 16 Ad3d 648, affd 7 NY3d 434; Zaslowsky v J.M. Dennis Construction Company, 26 AD3d 372).

"It is well established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)...it

⁵A position statement by the American College of Occupational and Environmental Medicine (ACOEM) concluded that although molds are common and important allergens, they are not dominant allergens and that outdoor molds, rather than indoor molds, are most important. ACOEM (2002) also noted that although molds growing indoors are believed by some to cause building-related symptoms, "the causal connection remains weak and unproven...." A further review of the literature by Kolstad et al. (2002) noted that the studies do not show that increasing levels of viable mold were related to an "increasing occurrence of asthma or to nose, eye and skin symptoms, fatigue or headache in the adult population...." The IOM reviewed the scientific literature concerning asthma and indoor air exposures and concluded that the evidence was sufficient for a causal relationship only for exposure to house dust mites (IOM 2000). For molds or fungi, the IOM committee found that the evidence showed an association but it was not sufficient to show that a causal relationship exists (IOM 2000).

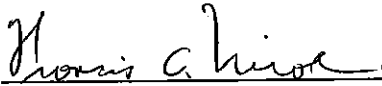
is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, *provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community*" (Parker v Mobil Oil Corp., *id* at 447) and is a "scientific expression of [plaintiffs'] exposure level" (emphasis added). The Court of Appeals in Parker made it clear that, although it is not always necessary for a plaintiff to quantify exposure levels precisely, whatever methods an expert uses to establish causation must be generally accepted in the scientific community.

Defendants established their prima facie entitlement to judgment as a matter of law by producing expert evidence based on a scientifically-reliable methodology that there was no causal connection between the exposure to "toxic mold" and plaintiffs' injuries. The burden then shifted to plaintiffs to raise a triable issue of fact as to causation (see Zaslowsky v J.M. Dennis Construction Company, 26 AD3d 372; Alvarez v Prospect Hosp., 68 NY2d 320). However, the bald statements by Dr. Frank M. Tamarin and the environmental consultant, James Rood, unsupported by the scientific literature and refuted by Dr. Clark, do not meet the traditional standard explicated in Frye.

Based upon the foregoing, plaintiffs' experts are precluded from testifying (see Pauling v Orentreich Med. Group, 14 AD3d 357). And, in the absence of expert testimony on the issue of causation, plaintiffs are unable to establish a prima facie case as against defendant Crystal Restoration (see State Farm Mut. Auto. Ins. Co. v Hertz Corp., 2007 NY Slip Op 6664; Cafaro v Emergency Servs. Holding, Inc., 11 AD3d 496). Accordingly, defendant Crystal Restoration's motion for summary judgment is granted and the complaint is dismissed as against this defendant.

With respect to the cross motion by defendants Safeguard Insurance Company and Royal & Sunalliance, plaintiffs allege that Royal is liable to them for damages as Royal's conduct by its agents, servants and/or employees caused, created and exacerbated the condition in their home leading to mold contamination and complete dismantling of the home down to the studs and rafters. Contrary to plaintiffs' contentions, conclusory allegations are insufficient to support any claim for negligence or a cause of action under GBL §349. Moreover, there is insufficient evidence to support a claim for punitive damages. Accordingly, the cross motion by defendants Safeguard Insurance Company and Royal & Sunalliance for an Order granting summary judgment dismissing the complaint is granted, and the complaint is dismissed as against these defendants.

Dated: White Plains, New York
October 27, 2007


FRANCIS A. NICOLAI
A. J.S.C.

TO:

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