

**Litwack v Plaza Realty Investors, Inc.**

2004 NY Slip Op 30264(U)

November 12, 2004

Supreme Court, New York County

Docket Number: 104745/02

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC Justice JSC

PART \_\_\_\_\_

0104745/2002

LITWACK, WENDY  
VS  
PLAZA REALTY INVESTOS

SEQ 1

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *decided*  
*pursuant to attached Return*

**FILED**  
NOV 16 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/12/04

HON. MARILYN SHAFER, JSC J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----X  
WENDY LITWACK,

Plaintiff,

-against-

Index No.  
104745/02

PLAZA REALTY INVESTORS, INC.,  
LAURENCE T. GINSBERG, ALBERT  
GINSBERG, LAURENCE TOWERS  
COMPANY LLC and ALGIN MANAGEMENT  
CO., LLC,

Defendants.

-----X  
**Shafer, J.:**

Defendants move for an order, pursuant to CPLR 3212, dismissing the complaint, on the grounds that: (1) defendants did not have actual or constructive notice of the condition which allegedly caused plaintiff's injuries; (2) plaintiff cannot establish a causal connection between her alleged exposure to mold in her apartment and her injuries; (3) the claim for breach of the warranty of habitability is meritless; and (4) plaintiff has failed to submit documents to support her personal property damage claim, despite a court order.

This is an action between a tenant and her former landlord, in which the tenant claims that her apartment was permeated with toxic mold from previous water leaks, and that this exposure was the cause of her injuries, which included asthma, allergies, chronic rhino sinusitis, hypersensitivity pneumonitis, and cognitive disorders.

**FACTS**

The apartment is at 200 East 33<sup>rd</sup> Street, Apartment 30G, New York, New York (the

**FILED**  
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COUNTY OF NEW YORK

\* 3 ]

Premises). Defendants own and manage the building and the Premises. Plaintiff resided in the Premises from 1986 until July 2001. Deposition of Wendy Litwack, Exhibit E to Notice of Motion, at 8. Plaintiff's mother previously lived in and furnished the Premises. Id. at 9-10. The Premises, one bedroom with one and a half bathrooms, was fully carpeted, including the bathrooms, but not the kitchen, and the bathrooms were wallpapered. Id. at 35-36. Plaintiff testified that she only removed and replaced the carpet in one of the bathrooms, and the rest remained from before she moved in. Id. at 35-36.

Plaintiff testified at her deposition that the Premises had an air conditioning and heating unit combined in the living room, the bedroom, and the dining room, and that, in the summer, these units would drip constantly unless they were turned off. Id. at 39-42; 65. She complained to defendants, but was told to turn the units off, and not to worry about it. Id. at 65.

Plaintiff claims that in April 1999, she noticed a brown discoloration spot on the wall in her dining room, which was wet if touched. Id. at 19-23. She asserts that she notified defendants, and a handyman was sent up to look at it. Id. at 23-24. The handyman took out a five-to six-inch section of the wall. Plaintiff asserts that she saw a steampipe behind the opening, and that, while she did not see any water dripping, there was water around the opening of the hole. Id. at 32. She states that the handyman said it couldn't be fixed until the building heat went back on in the fall. Id. at 25. The spot on the wall got worse, and she complained several times over the summer. Id. at 26. Finally, in the fall, defendants hired an outside plumber to replace a copper pipe and fitting. See Affidavit of Joseph Torres, dated January 22, 2004. Defendants then repaired the wall.

Plaintiff claims that, in the fall of 1999, she started to feel sick, including shortness of

breath, chronic diarrhea, her organs hurt, constant pain and pressure between her shoulder blades, rashes on her face and chest, night sweats, flu-like symptoms, sleepiness, inability to eat, memory problems, and difficulties concentrating. Litwack Dep. at 47-49. She attests that these symptoms were continuous, and only subsided when she left the Premises for a period of time, and finally when she moved out in 2001. Id. at 49-50.

In October 1999, she began going to her family doctor for those symptoms. Id. at 51-52. She then began seeing a number of other specialists, including a pulmonologist, endocrinologists, internists, and infectious disease specialists, and underwent many tests. Id. at 52-58. In July of 2001, she went to the Mayo clinic in Arizona for more tests. She saw an endocrinologist, an internist, an infectious disease doctor, a neurologist, a rheumatologist, an allergist, and a rehabilitation doctor. Id. at 58-59. She states that she received no diagnosis, but was advised that if, upon her return to her apartment, she became ill again, she should have the apartment environmentally tested. Id. at 59-60. When she returned home, plaintiff asserts that she got sick immediately. Id. at 60. She hired an environmental specialist, Lawrence Molloy, to come and take samples from all over the Premises. Id. at 61-62. Mr. Molloy used P & K Microbiology Services, Inc. and Environmental Microbiology Laboratory, Inc. to analyze the samples. Plaintiff attests that these test results showed that molds including *Aspergillus Penicillium*, *Stachybotrys*, and other molds were present in the Premises. Id. at 68-69; see Exhibit I to Notice of Motion, P & K Microbiology Services, Inc. and Environmental Microbiology Laboratory, Inc. Test Results.

Plaintiff admits that she did not discuss with defendants her concerns that there might be an environmental problem with the Premises, either before or after she retained Mr. Molloy. Id. at 72. Plaintiff moved out of the Premises in July 2001, but did not advise defendants and

formally surrender the apartment until February 2002. Id. at 73.

In November 2001, plaintiff retained an attorney to approach defendants with a "letter of demand." Id. at 79-80; Exhibit I to Notice of Motion. In this "letter of demand," plaintiff informed defendants that the testing of the air and materials in the Premises indicated excessively high levels of fungal matter, and that she was experiencing severe flu-like symptoms after a water leak in the building. Exhibit I to Notice of Motion. She also informed them that, after a series of doctor visits and extensive testing, it was determined by her doctor, Dr. Eckardt Johanning, that she has been exposed to toxic mold. Id. She demanded damages, as well as removal and remediation so that she could return to the Premises. The letter also enclosed the two laboratories' test results. Id.

On January 10, 2002, plaintiff hired Olmstead Environmental Services to conduct a thorough evaluation of the Premises. See Affidavit of Edward Olmstead, dated May 12, 2004. Edward Olmstead surveyed the apartment, and reviewed the P&K Microbiology Services and Environmental Microbiology Laboratory test results. He stated that the Premises showed microbial contamination from Chaetomium, Stachybotrys Chartarum, Penicillium, Endotoxin, Cladosporium, and Aspergillus and Niger. Id., ¶ 4. He indicated that the tests showed Cladosporium and Penicillium in the area where the leak was, in amounts significantly above the outdoor level. He further stated that Stachybotrys Chartarum was found in the public hallway, as well as in the dining room, living room, and the inside hallway, and not outdoors on the terracc. Id. Mr. Olmstead concluded that the failure to repair the water leak in the dining room, and other recurrent water leaks, and the failure to timely and properly remediate the water-damaged building materials, resulted in the release of mold fragments throughout the Premises, and in

significant and excessive microbial contamination of the building with atypical molds which are known to cause adverse health effects. Id., ¶ 5.

On March 7, 2002, plaintiff commenced this action by serving a complaint, which she amended as of right. In her Amended Complaint, plaintiff asserts six causes of action: (1) negligence in the ownership, operation, and maintenance of the Premises; (2) violations of statutes and codes; (3) breach of the warranty of habitability, causing her personal injuries; (4) constructive eviction; (5) negligence, causing plaintiff property damage; and (6) false representations that the Premises were clean and habitable, causing plaintiff to suffer serious permanent injuries.

In the course of discovery, plaintiff produced a report, dated January 4, 2002, from her doctor, Dr. Johanning. Exhibit J to Notice of Motion. In this report, Dr. Johanning indicates that he has taken a comprehensive medical, occupational, and environmental health history of plaintiff, and briefly reviews plaintiff's immediate complaints. Id. He states that he was given photos and environmental health reports by Mr. Molloy, P&K Microbiology Services, and Environmental Microbiology Laboratory, Inc. for his review of the environmental conditions at the Premises. See Exhibit I for both laboratory test reports. He concludes that there is evidence of water damage to the building materials from a steam leak in the spring of 1999, and that there is resulting mold growth. Id. Dr. Johanning states that plaintiff's symptoms, physical signs, and test results are consistent with exposure to allergenic and toxic fungi. He asserts that his diagnosis for plaintiff is fungal allergy, reactive airway disease (asthma), and fungal syndrome. Id. He finds that, while she has a medical history of Graves disease, a thyroid condition, that condition is unrelated to the current complaints and to her environmental exposure. He

concludes that "[w]ith a reasonable degree of medical certainty, I believe that the current upper and lower airway inflammatory conditions and the constitutional problems of [plaintiff] have been caused and are aggravated by the indoor mold contamination resulting from the water damage inside her apartment." Id. He also concludes that plaintiff's condition is permanent. Id.

Plaintiff also produced a report from Dr. Wayne A. Gordon, a neuropsychologist, who tested plaintiff on five separate dates from March 18, 2002 to April 8, 2002. Exhibit K to Notice of Motion. Dr. Gordon's report indicates a diagnosis of toxic encephalopathy. Id. at 1. Dr. Gordon concludes that plaintiff is experiencing cognitive difficulties which are most likely a result of her exposure to fungi and molds. Id. at 7. He states that her concentration and memory deficits are substantial, as is her ability to consistently regulate and organize herself. Id. He recommends certain cognitive remediation to help her develop compensating strategies. Id. at 8.

### **This Motion**

In moving for summary judgment, defendants first contend that they did not have actual or constructive notice of the alleged toxic mold condition, and, therefore, cannot be held liable. They submit the deposition and the affidavit of the building superintendent, William Rottmayer, who attests that no tenant, including plaintiff, ever complained of mold in the building at any time prior to plaintiff surrendering possession of her apartment. Exhibit G to Notice of Motion, Deposition of William Rottmayer, at 52-53; Affidavit of William Rottmayer, dated January 27, 2004, ¶ 5. They point to plaintiff's admission that she did not discuss with defendants her concern that there might be an environmental problem with the Premises. Exhibit E to Notice of Motion, Litwack Dep., at 72. While defendants admit that plaintiff's attorney sent a "letter of demand" regarding the condition of the Premises in late November 2001, they assert that plaintiff

had already moved out of the Premises, and that the test results supplied by plaintiff's counsel did not even indicate indoor mold concentrations "above background levels," and that there was no evidence of mold in the indoor ambient air. They contend that plaintiff did not observe visible mold inside her apartment, or the building, prior to the time that she vacated it, and that she did not observe wet carpets. They urge that the infrequent visits by defendants' handyman to perform small repairs, in the absence of any testimony that defendants had any notice of any hazardous condition in the apartment prior to plaintiff's alleged exposure, does not satisfy the notice requirement. Defendants submit the affidavit of Jerzy Zakowicz, the handyman, who attests that he never observed any standing water or mold in the Premises, and that the sheetrock where the water spot was on the dining room wall was not damp or crumbly. Exhibit F to Notice of Motion, Deposition of Jerzy Zakowicz, at 51-54. Finally, they submit the affidavit of the plumber, Joseph Torres, who did the actual repair on the steampipe, and he attests that there was no visible mold growth. Torres Aff., ¶ 3.

Defendants further urge that plaintiff fails to establish a causal connection between her alleged injuries and exposure to mold or mycotoxins. They contend that plaintiff cannot establish that her expert's opinion, that there is such a causal connection, has gained general acceptance in the scientific community. Therefore, they contend, the evidence should be precluded, and summary judgment dismissing the complaint is appropriate. In support of this position, defendants submit the affidavit of Dr. Ronald E. Gots, a physician and toxicologist, as an expert in environmental and occupational toxicology. Affidavit of Ronald E. Gots, dated January 27, 2004. Dr. Gots opines that it is not generally accepted by the medical and scientific communities that mold or their mycotoxins found in homes cause the claimed disorders. Gots

Aff., ¶ 6. Dr. Gots states that the presence of any type of mold in a home does not establish that an exposure to mycotoxins at a dose considered to be sufficient for an adverse reaction has occurred. Id. He determined that the diagnostic and causal conclusions of Drs. Gordon and Johanning are unreliable for showing causation because there is no evidence, according to him, that plaintiff was exposed to mold at levels above normal, or that mycotoxins were present in the indoor ambient air, and because neither of those doctors has scientific or medical evidence about a causal relationship between the illnesses and the alleged exposure. Id., ¶ 7. He states that there is insufficient exposure evidence, because air sampling is not useful for this, and that the sampling by plaintiff's consultants were taken from areas, such as inside the walls, which were not accessible to plaintiff. Id., ¶¶ 9-11. He attests that the "medical and scientific communities recognize that the mere presence of *Stachybotrys*, or any other mold, in samples of bulk material or surface wipes does not mean that mycotoxins were present in ambient air." Id., ¶ 13. He supports this with reference to several published articles.

With respect to alternate causes for plaintiff's symptoms and illnesses, Dr. Gots asserts that neither Dr. Johanning nor Dr. Gordon properly examined alternate causes. Id., ¶¶ 15-19.

On the issue of mold exposure and the resulting effects, Dr. Gots states that there are three categories of effects identified regularly in medical and scientific literature: allergic, infectious, and potential toxicogenic. Id., ¶ 20. The allergic effects include respiratory allergies, asthma, and, on rare occasions, hypersensitivity pneumonitis. Plaintiff, he points out, underwent mold allergy testing at the Mayo clinic in July 2001, which testing was negative. The infectious effects from mold exposure are primarily seen in immunocompromised individuals. He states that plaintiff's medical records do not reveal any true immunodeficiency. As to the toxicogenicity

effect, Dr. Gots states that, while some molds produce mycotoxins, there is no evidence in the medical and scientific literature that adverse health effects are associated with chronic, low-dose inhalation exposure to mycotoxins. Id. He recognizes that certain symptoms have been associated with mold exposure, including headaches, breathing difficulties, allergic reactions, and aggravation of asthma symptoms, as well as irritant effects, such as burning sensations in the eyes, skin, nose, and throat, which are transient. Id.

Dr. Gots addressed previous testimony and reports by Dr. Johanning, stating that Dr. Johanning relied on self-reporting responses to questionnaires in coming to his hypotheses about molds causing a variety of disorders, which Dr. Gots states are highly subject to observer and patient bias. Id., ¶¶ 21-22. With regard to Drs. Johanning's and Gordon's theories that mold toxins cause brain damage in individuals exposed in an indoor environment, Dr. Gots attests that their studies set forth in non-peer review publications over the last several years, do not establish such an association, and that they were poorly-designed epidemiologic studies. Id., ¶¶ 25, 27, 29, 30. He also states that no other researchers, using properly designed studies, have identified an association. Id., ¶ 26.

In opposition to defendants' motion, on the issue of notice, plaintiff asserts that she attested to a history of leaks in the Premises, including the leak in the dining room, as well as leaks from the air conditioning units. She particularly points to the dining room leak, which defendants examined, and not only failed to fix for six months, but left an opening in the wall where the leak was, which gave rise to her mold exposure. She also submits a letter dated November 1995 from her stepfather, who lived in the Premises for many years with her mother, to defendants, complaining of leaks and problems with the bathrooms that, in his words, had

been going on for a long time. Exhibit C to Opposition Papers. Thus, she asserts that defendants were on notice of a defective, watery condition, giving rise to her mold exposure. Plaintiff points to the conclusion reached by Mr. Olmstead, one of her environmental consultants, that when defendants finally came to fix the leak in the fall of 1999, they failed to use precautions when removing the wet sheetrock to ensure that mold fragments and spores were not released, which likely caused more mold to be released into the air. Exhibit A to Opposition Papers. She states that Mr. Olmstead's report demonstrates that there was highly toxic mold throughout the Premises, and that it is reasonable to assume that there was airborne mold and its toxic byproducts. Thus, she urges that defendants were on constructive notice, and either created the condition or negligently repaired the leak, permitting the hazardous condition to fester.

Finally, she contends that Dr. Johanning's report demonstrates that her injuries were caused by the very mold in her apartment, and that this diagnosis is a valid medical finding.

Plaintiff also argues that defendants' motion is an evidentiary motion, and must be brought at the time of trial. She asserts that the issue as to the admissibility of her medical and scientific expert evidence should be the subject of an evidentiary hearing known as a Fryc hearing. See Fryc v United States, 293 F 1013 (DC App 1923). With respect to the medical and scientific evidence, plaintiff contends that her experts' affidavits, which cite to articles and other literature, clearly contradict Dr. Gots' conclusion that there is no causative link between damages to humans and indoor mold toxins. Plaintiff submits an affidavit from Dr. Johanning in which Dr. Johanning reviews plaintiff's symptoms, his diagnosis, and his conclusion that her problems are directly related to her exposure to allergenic and toxic mold at the Premises. Affidavit of Eckardt Johanning, dated May 5, 2004, annexed as Exhibit D to Opposition Papers. He states

that, while he removed her medically from that environment, her health problems were not resolved. Johanning Aff., ¶¶ 5-7. He states that, in March 2002, he referred her to Dr. Gordon because of her cognitive deficits. He states that Dr. Gordon's tests came back positive, confirming that plaintiff has cognitive impairments regarding information processing speed, memory, verbal learning, and executive functioning. Johanning Aff., ¶ 8. He attests that Dr. Gordon concluded, with a reasonable degree of medical certainty, that her cognitive deficits are secondary to the toxic molds at her residence. Id. He also opined that it was his belief, to a reasonable degree of medical certainty, that her prior condition of Graves disease has no bearing on her present condition. Id., ¶ 9. Dr. Johanning's affidavit is followed by his Curriculum Vitae, which lists his allegedly peer-reviewed reports, books, and other publications, a number of which directly concern toxigenic fungi and health, dating from 1995 through to the present. Id.

Plaintiff also submits a chapter from a textbook, entitled Textbook of Clinical Occupational and Environmental Medicine, authored by Dr. Cecil Rose. Exhibit E to Opposition Papers. In this chapter, entitled "Hypersensitivity Pneumonitis," Dr. Rose reports that there are many organisms, including toxic mold and their byproducts, which cause hypersensitivity pneumonitis. Id. at 243. In addition, plaintiff submits a copy of the New York City Health Guidelines which indicate that immunological reactions to fungi include asthma, hypersensitivity pneumonitis, and allergic rhinitis. Exhibit G, NYC Health Guidelines, § 1.1.1, at 3. The Guidelines assert that the toxic effects of fungi can be manifested in a wide variety of symptoms, such as fatigue, nausea, headaches, and respiratory and eye irritations, as well as other non-specific symptoms, such as discomfort, inability to concentrate, and fatigue. Id., § 1.1.2, at 3. The Guidelines further provide that "[e]mphasis should be placed on preventing contamination

through proper building maintenance and prompt repair of water damaged areas." Id., at 12. The Guidelines refer to several writings by Dr. Johanning in the list of references. Id. at 12-13, n 3 & n 20.

Finally, in response to defendants' assertion that plaintiff failed to submit documents supporting her property damage claim, plaintiff submits a Verified Supplemental Bill of Particulars, with receipts and credit card bills for things such as furniture, office and household supplies, and expenses for testing, cleaning, and remediation. Exhibit H to Opposition Papers.

### DISCUSSION

The defendants' motion is granted only to the extent of dismissing the third cause of action for breach of the warranty of habitability, and granting a Fryc hearing, and is otherwise denied.

Plaintiff's claim for breach of the warranty of habitability, under Real Property Law § 235-b, seeks to recover damages for personal injuries. These damages are not recoverable for such a breach. See Elkman v Southgate Owners Corp., 233 AD2d 104 (1<sup>st</sup> Dept 1996) (loss or diminution in value of personal property as well as personal injuries are not recoverable).

Plaintiff presents no opposition to this branch of defendants' motion, and, therefore, it is granted.

The branch of the motion for summary judgment, dismissing the negligence claim based on a lack of notice, is denied. A landlord has a duty to maintain the premises in a reasonably safe condition. See Chapman v Silber, 97 NY2d 9, 19 (2001). A landlord may be liable for a "failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs." Id. at 19. Thus, to be held liable, the landlord must have actual or constructive notice

of the condition for such a period of time that, in the exercise of reasonable care, the landlord should have corrected it. See Putnam v Stout, 38 NY2d 607, 612 (1976).

While defendants make a showing that they did not have actual notice of a hazardous mold condition in the Premises, they have framed the notice issue too narrowly. In many situations, as in the instant case, mold may be undetectable to the senses. The toxic mold to which plaintiff is referring is not the kind found between the bathroom tiles that maybe be observable to the eye. Rather, it is more insidious, and can be found as a dust on walls or surfaces or, most importantly, airborne and not readily apparent. Therefore, a landlord would not actually know of its presence without testing. As a result, a landlord may deliberately refrain from checking or testing after water damage, and shield itself from liability. See Chapman v Silber, 97 NY2d at 20-21 (lead paint condition). To avoid a rule that would make the situation impossible for a plaintiff to hold a landlord reasonably accountable, the notice issue here is framed in terms of whether defendants had actual or constructive notice of a condition on the Premises, i.e., persistent water leaks, which resulted in a hazardous mold condition. Framed as such, plaintiff has presented proof of a triable issue.

Plaintiff's proof consists of deposition testimony of persistent water leaks from the air conditioning units, which leaks were reported to defendants, but which they did nothing about. She also presents proof of the dining room leak, of which defendants admittedly were aware, and which resulted in the wet wall area being left exposed for six months. This clearly raises an issue as to whether defendants had actual, or at the least constructive notice, of a hazardous condition on their Premises. The testimony from the plumber that he did not see any mold only emphasizes that this condition, created by leaks and the resulting dampness, may not be readily observable to

the eye. The proof from plaintiff's experts, Dr. Johanning, Mr. Molloy, and Mr. Olmstead, is some proof that the wet and damp conditions from these leaks created the mold condition in the Premises which caused plaintiff's harm.

Defendants' reliance on several older lead paint cases in which the courts found no actual or constructive notice, even where the landlord was aware of peeling and chipping paint, is misplaced. The Court of Appeals in the Chapman case (supra), decided after these earlier cases, has indicated that the rule that the landlord must be aware that lead is present in the chipping paint, which like mold is something that is undetectable to the senses, is too narrow and makes it impossible for a plaintiff to hold a landlord reasonably accountable. Compare Andrade by Andrade v Wong, 251 AD2d 609 (2d Dept 1998) and Lanthier by Lanthier v Feroletto, 237 AD2d 877 (4<sup>th</sup> Dept 1997), with Chapman v Silber, 97 NY2d at 20-21. Moreover, defendants' reliance on slip and fall cases also is misplaced. The dispersal of mold in a premises, particularly airborne mold, again, may not be detectable by the senses, whereas a piece of trash, or a puddle on the floor, could be seen. Cf. Gordon v American Museum of Natural History, 67 NY2d 836 (1986) (slip on paper on museum steps); Luzinski v Kenvic Assocs., 242 AD2d 246 (1<sup>st</sup> Dept 1997) (slip on ice). Therefore, summary judgment dismissing plaintiff's negligence claims is inappropriate.

The branch of defendants' motion precluding plaintiff from offering testimony at trial regarding the alleged causal link between her injuries and her exposure to mold in the Premises, is granted only to the extent that the parties are directed to appear for a Frye hearing to determine the admissibility of such testimony. Before plaintiff's experts can testify as to his or her opinion before a jury, this court must exercise its role as "gatekeeper" and review the evidence to

ascertain whether plaintiff's experts' opinions are scientifically or technically "reliable" and "generally acceptable" in the scientific community. The policy behind the court's "gatekeeper" role is to "keep unreliable evidence ('junk science') away from the trier of fact regardless of the qualifications of the expert." Clemente v Blumenberg, 183 Misc 2d 923, 932 (Sup Ct, Richmond County 1999).

The threshold standard for admissibility of expert testimony based on scientific or medical principles or procedures in New York is derived from Frye v United States (293 F 1013, supra), which requires that novel or innovative scientific evidence be based on a principle or procedure which has "gained general acceptance" in its specific field. People v Wesley, 83 NY2d 417, 422 (1994), quoting Frye v United States, 293 F at 1014; see also People v Wernick, 89 NY2d 111 (1996). Therefore, when a new or novel scientific technique or theory is challenged, the court's task is to seek out the opinions of the relevant scientific community. If there is general acceptance in the scientific community, the expert can testify to the theory. If there is not general acceptance by that community, then the expert cannot testify.

The particular theory, however, need not be "unanimously endorsed" by the scientific community, but must be "generally accepted as reliable." People v Wesley, 83 NY2d at 423, quoting People v Middleton, 54 NY2d 42, 49 (1981). The general acceptance standard applies in civil cases, as well as in criminal matters. Collins v Welch, 178 Misc 2d 107 (Sup Ct, Tompkins County 1998), citing Castrichini v Rivera, 175 Misc 2d 530 (Sup Ct, Monroe County 1997).

For the expert's opinion to be generally accepted, his or her methodology cannot include mere possibilities, speculation, or conjecture. See People v Angelo, 88 NY2d 217 (1996); see also Clemente v Blumenberg, 183 Misc 2d 923, supra; Collins v Welch, 178 Misc 2d 107, supra.

It is plaintiff's burden to show "the generally accepted reliability of such procedure in the relevant scientific community through judicial opinions, scientific or legal writings, or expert opinion other than that of the proffered expert." Selig v Pfizer, Inc., 185 Misc 2d 600, 605 (Sup Ct, NY County 2000), affd 290 AD2d 319 (1<sup>st</sup> Dept), lv denied 98 NY2d 603 (2002), quoting Cameron v Knapp, 137 Misc 2d 373, 375 (Sup Ct, NY County 1987).

Under Frye, the court does not determine whether a scientific technique is actually reliable, but, instead, "whether there [is a] consensus in the scientific community as to its reliability." People v Wesley, 83 NY2d at 439 (concurring opinion, Kaye, Ch J). Thus, the Frye test emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion." Id., quoting Jones v United States, 548 A2d 35, 42 (DC Ct App 1988).

Here, defendants' motion to preclude plaintiff's experts from offering testimony about the alleged causal link between her alleged exposure to mold on the Premises and her injuries, is denied. Defendants have presented some evidence that the conclusion reached by plaintiff's experts with regard to cognitive injuries is not generally accepted in the scientific community. However, their own expert, Dr. Gots, admits that there are three categories of effects from mold exposure – allergic, infectious, and toxicogenic – identified regularly in medical and scientific literature, many of which are effects and illnesses of which plaintiff complains, and which her experts have identified. Although defendants conclusorily assert that plaintiff's experts set forth their studies in non-peer review publications, conducted poorly-designed studies, and improperly relied on self-reporting responses to questionnaires, plaintiff has presented proof of Dr. Johanning's numerous publications, including studies, articles, books, and lectures.

In addition, plaintiff has presented proof of a class action in the United States District

Court for the Eastern District of Washington, in which the plaintiffs are claiming injuries from mold-contaminated air at a school, and in which Dr. Johanning was permitted to testify that mold problems from water leaks on the premises can cause the specific personal injuries. See Exhibit F to Opposition Papers. In that case, the defendants had similarly attacked Dr. Johanning's testimony as based on self-reported injury data, and not on epidemiological studies, and lacking a reliable model for assessing causation, such as a dose-response relationship. See id. at 12-16. The Court found that defendants were trying to force plaintiff's expert testimony into a model for causation that does not fit the facts of the case. Id. at 17. It found that Dr. Johanning's criteria for forming his opinions was sufficiently reliable. While obviously this court is not bound by that conclusion, it is a judicial opinion supporting plaintiff's assertions of the reliability and acceptance in the scientific community of her experts' causation theory. See Selig v Pfizer, Inc., supra, 185 Misc 2d at 605; see also Feit, "Toxic Mold Litigation: The Frenzy Continues," NYLJ, December 6, 2002, at 4, col 4; Goldman, "Perspective: Toxic Mold Is Here To Stay," NYLJ, April 3, 2002, at 2, col 3. Moreover, the New York City Department of Health Guidelines support plaintiff's experts' opinions that the toxic effect of fungi can be manifested in a variety of symptoms and conditions, including some cognitive difficulties. See Exhibit G to Opposition Papers.

The court rejects plaintiff's assertion that this motion is procedurally improper because it is premature. While these motions are typically made at the time of or during trial, there is no rule barring the consideration of the appropriateness of certain expert testimony, particularly where the action is at the summary judgment stage, as it is here.

Because the alleged relationship between mold and the various symptoms and conditions,

including cognitive deficiencies, suffered by plaintiff is a sufficiently novel scientific or medical opinion, a Fryc hearing is warranted. See e.g. Zafran v Zafran, 191 Misc 2d 60 (Sup Ct, Nassau County 2002); In re Rezulin Litigation, 2002 WL 31107923 (Sup Ct, NY County 2002). Neither party has presented sufficient evidence on this motion to conclusively demonstrate whether or not the causal connection between mold and the various symptoms and conditions is generally accepted in the scientific community. Therefore, a Frye hearing must be held, prior to the trial of this matter.

Finally, the branch of defendants' motion dismissing the claims for property damage because of plaintiff's failure to submit supporting documentation, is denied as moot. Plaintiff has now served her Supplemental Bill of Particulars, with copies of receipts and credit card statements regarding her alleged property damage claim. To the extent that defendants, on reply, have challenged whether plaintiff can prove that mold can and did cause damage to this personal property with this evidence, this challenge is inappropriate on reply, and these issues will not be resolved on these papers.

Accordingly, it is

ORDERED that the motion for summary judgment is granted only to the extent that the third cause of action is dismissed; and it is further

ORDERED that a Frye hearing will be held to establish the admissibility of expert testimony on the issue of the causal relationship between exposure to mold at a premises and the conditions and symptoms suffered by plaintiff, including asthma, allergies, chronic rhino sinusitis, hypersensitivity pneumonitis and cognitive disorders; and it is further

ORDERED that such hearing shall be conducted immediately before the trial of this

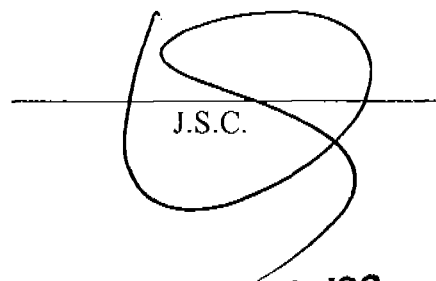
action; and it is further

ORDERED that the remaining branches of the motion are denied.

Dated: \_\_\_\_\_

11/12/04

ENTER:

  
J.S.C.

HON. MARILYN SHAFER, JSC

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