SUPREME COURT
STATE OF NEW YORK COUNTY OF CAYUGA

BEATRICE ROSECRANS, CYNTHIA ROSECRANS,
and LAWRENCE ROSECRANS,
Individually and as Parents and Natural Guardians
of DANIEL ROSECRANS,

DECISION

Plaintiffs,

Index No. 97-9357

vs.

Assigned Justice:
Hon. Mark H. Fandrich

MARK DUNN, DANIEL SOULES, SOULES & DUNN
ASSOCIATES, and HARRY COOPER,

Defendants.

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Fandrich, Mark H., Acting Justice

This action was commenced by plaintiffs for personal injuries allegedly suffered from carbon monoxide poisoning by reason of a defective furnace on premises at 309 South Seward Avenue in the City of Auburn, New York. Plaintiffs, Lawrence Rosecrans and Cynthia Rosecrans, purchased the premises from defendants, Mark Dunn and Daniel Soules, on December 14, 1994. According to the deposition of defendant Dunn, although the premises were titled to defendant Dunn, it was an asset of defendant, Soules & Dunn, a general partnership.[1] Plaintiffs took pre-closing possession of the premises on September 23, 1994, at an agreed monthly rental, and continued to reside in the premises through the date of the closing of the transaction.

Plaintiffs allege that the defendants made negligent repairs to the furnace, thereby causing plaintiffs' damages. Plaintiffs also maintain that defendants made misrepresentations concerning the safety of the furnace, via defendants' agent: defendant, Harry Cooper. Plaintiffs allege that defendant Cooper told plaintiffs that the furnace was "safe."[2] Plaintiffs state that they turned on the furnace in September 1994 when they moved into the premises, and then again in November, 1994. Plaintiffs had an energy audit completed by NYSEG on December 23, 1994, which showed excess carbon monoxide levels of 50 ppm in the basement of the dwelling. Plaintiffs contacted Cayuga County Homesite, who replaced the furnace with a new one and disposed of the old furnace.

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1 See Deposition of defendant, Mark Dunn, pp. 154, 155.

2 Plaintiffs submitted a paper dated Aug 26, on which there appears the following: "3) furnace – Radon, C.M. fine." According to plaintiffs, defendant Harry Cooper made this representation and initialed the paper, thereby representing to plaintiffs that the furnace was safe. (See, also, Deposition of plaintiff, Cynthia Rosecrans, pp. 53-55). Defendant Cooper acknowledges initialing the paper. (See Deposition of defendant, Harry Cooper, pp. 202, 203.).

Defendants make this motion for summary judgment, alleging, *inter alia,* that plaintiffs had a sufficient time to inspect the premises and took the premises in "as is" condition as recited in the purchase contract between the parties.[3] Defendants maintain that even if defendant Cooper made representations as to the condition of the furnace, there was no confidential or trust relationship between the defendants and the plaintiffs. Defendants also allege that the furnace in question is not available for inspection by defendants, and therefore, there is an issue of spoliation of evidence. In response to plaintiffs' allegations of negligent repair of the furnace, defendants state that plaintiffs have offered no evidence of negligent repair, and further that spoliation of the furnace has usurped defendants' ability to defend against such an allegation. Finally, defendants question plaintiffs' experts with respect to carbon monoxide poisoning and request *Frye* and *Daubert* hearings.

The court finds that defendants' motion for summary judgment should be denied since there are "questions of fact to be determined by the trier of fact." (*Chilberg v. Chilberg*, 13 A.D.3d 1089, 4th Dept., 2004).

A. Negligent Repair and Misrepresentation

Plaintiffs have alleged that the defendants made negligent repairs to the furnace on the premises and that such repairs caused plaintiffs' damages. Defendant, Harry Cooper, admitted replacing several heating runs in the area of the furnace.[4] The area of the house where carbon monoxide was found was in the basement after the repairs were made. Although there is no evidence in the record of carbon monoxide levels in other parts of the dwelling, a question of fact exists as to whether the repairs made by defendant Cooper contributed to the recorded

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3 Under the heading of "INSPECTION", the Purchase and Sale Contract states the following: "I have inspected the premises and I understand that they are purchased 'as is' except as otherwise provided therein. I shall have the right to inspect the premises prior to closing with the reasonable notice to the seller."

4 See Deposition of defendant, Harry Cooper, pp. 212 – 215.

carbon monoxide levels in the basement, which, in turn, caused plaintiffs' injuries. (*Doster v. Binghamton Gas Works*, 197 Misc.2d 810, County Court, Broome County, 1950; *Korcz v. Worthington Corp.*, 34 A.D.2d 721, 3rd Dept., 1970). The record indicates that plaintiffs did suffer from symptoms which could be attributed to carbon monoxide exposure and that there were substantial levels of carbon monoxide in the basement of the dwelling. (*Doster v. Binghamton Gas Works*, *supra.*; *Korcz v. Worthington Corp.*, *supra.*). Thus, the question of defendant Cooper's alleged negligent repair should be determined at trial.

On the question of whether defendants negligently misrepresented the condition of the furnace to plaintiffs as being safe, defendants argue that no special relationship of trust or confidence existed between the plaintiffs and defendants which would have created a duty on the part of the defendants to impart correct information to plaintiffs. (See, *H&R Project Associates, Inc. v. City of Syracuse*, 289 A.D.2d 967, 4th Dept., 2001). Defendants further argue that assuming such a duty did exist, plaintiffs had ample time to fully inspect the premises before the closing.[5] Moreover, defendants assert that plaintiffs paid a reduced price for the property due to the condition of the existing furnace, and purchased the property "as is".[6]

A cause of action for negligent misrepresentation must satisfy the test set forth in *International Products Co. v. Erie R. Co.*, (244 N.Y. 331, 1927):

> "There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon

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5 Plaintiffs assumed possession of the premises in September 23, 1994 and occupied for almost 3 months before they purchased the premises on December 14, 2004.

6 The original purchase price for the premises was $57,500.00. It was subsequently lowered to $55,000.00, and a second purchase was signed with the reduced price.

> the other for information, and the other giving the information owes a duty to give it with care."

The last prong of the test has been interpreted to require that privity of contract or a relationship "so close as to approach that of privity" is essential to a claim for negligent misrepresentation. (*Ossining Union Free School District v. Anderson LaRocca Anderson,* 73 N.Y.2d 417; *W.S.A. Inc., D/B/A Harmon Contract v. Key Trust Company,* 195 A.D.2d 1034, 4th Dept., 1993). And, the existence of such a special relationship is generally a question of fact. (*Hutchins v. Utica Mutual Insurance Company*, 107 A.D.2d 871, 3rd Dept., 1985; *Kimmell v. Schaefer*, 89 N.Y.2d 257, 1996; *AFA Protective Systems, Inc., v. American Telephone and Telegraph Company, Inc.,* 57 N.Y.2d 912, 1982).

There is privity of contract between plaintiffs, Lawrence Rosecrans and Cynthia Rosecrans, and defendants, Dunn, Soules and Soules & Dunn Associates, since these parties entered into a written contract to purchase and sell the real property in question. Whether defendant, Harry Cooper, is included in this privity of contract relationship is a question of fact. If defendant Cooper is determined to have an equitable interest in defendant, Soules & Dunn Associates, this relationship may include him as well. In any event, there is a question of fact as to whether a special relationship existed between the plaintiffs and defendants. Defendants provided information to plaintiffs about the furnace that was important. Also, defendants were aware that plaintiffs were relying on defendants' alleged representations with regard to the safety of the furnace, especially with respect to carbon monoxide. In addition to the said privity of contract relationship, these circumstances give rise to a question of fact as to whether a special relationship existed between plaintiffs and defendants with regard to plaintiffs' claim for negligent misrepresentation.

The fact that the parties' purchase contract contained an "as is" disclaimer is not dispositive. In actions involving fraud or negligent misrepresentations, such clauses do not shield a defendant from judicial inquiry into the alleged misrepresentations. (*Chopp v. Welbourne & Purdy Agency, Inc.*, 135 A.D.2d 958, 3rd Dept., 1987, *Tahini Investments, Ltd v Bobrowski*, 99 A.D.2d 489, 2nd Dept., 1984; *Smith v. Fitzsimmons*, 180 A.D.2d 177, 4th Dept., 1992). Even when the parties have executed a specific disclaimer, a purchaser may not be precluded from claiming reliance on any oral misrepresentations, especially when there are material issues of fact regarding the alleged misrepresentations. (*Tahini Investments, Ltd v Bobrowski*, *supra; Smith v. Fitzsimmons*, *supra.)*

Questions of whether plaintiffs, who had possession of the premises for nearly 3 months prior to closing, had sufficient time to inspect the furnace and repair it, are questions of fact that preclude summary judgment. (*Brown v. O'Connor*, 193 A.D.2d 1088, 4th Dept., 1998; *Young v. Hanson*, 179 A.D.2d 978, 3rd Dept., 1992; *Fisher v. Braun*, 227 A.D.2d 586, 2nd Dept., 1996).

B. Agency Issue

Defendants maintain that defendant, Harry Cooper, was an independent contractor and not an employee or equity owner of defendant, Soules & Dunn Associates. Defendants also maintain that defendant Cooper did not have an equitable interest in the premises. Defendant Cooper's role was one of assisting defendant, Soules & Dunn, in selling property and obtaining a commission based on the selling price.[7]

Based on defendant Cooper's status as an independent contractor, defendants maintain that the cause of action for negligent misrepresentation must fail and the Complaint dismissed

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7 See Affidavit of defendant, Harry Cooper, sworn to May 12, 2004.

since the only representations alleged by plaintiff were those of defendant Cooper, who was not an agent or partner of the other defendants, or an equitable owner in the premises.

However, a question of fact exists as to defendant Cooper status in this matter. Defendant Cooper notes, in his deposition, that the premises in question was purchased "before I became part of the partnership or was purchased just as we finalized."[8] This representation creates a question of fact as to defendant Cooper's status vis-à-vis the partnership of defendant, Soules & Dunn, and the remaining defendants. Moreover, defendants may be liable for the misrepresentations of defendant Cooper even though defendant Cooper acted as an independent agent. (*Chase Manhattan Bank, N.A., v. Perla*, 65 A.D.2d 207, 4th Dept., 1978). If these misrepresentations were committed within the scope of the authority given to defendant Cooper by the other defendants, then the other defendants may be held liable for defendant Cooper's actions. (*McGarry v. Miller*, 158 A.D.2d 327, 3rd Dept., 1990). This is a factual question to be determined at trial.

C. Spoilation Issue

Defendants argue that spoliation of the evidence, i.e., the absence of the old furnace, makes it impossible for them to defend this case, and that this Court should grant defendants summary judgment on that ground. The court finds that spoliation does not exist on the facts presented. The old furnace was removed by Cayuga County Homesite after that organization helped plaintiffs obtain a new furnace. There is no evidence that a claim existed at the time the old furnace was removed, or that one was contemplated. Certainly, there is no evidence of negligent or wrongful conduct on the part of plaintiffs with regard to the removal and subsequent unavailability of the old furnace. (*Conderman v. Rochester Gas & Electric*

8 See Deposition of defendant, Harry Cooper, p.192.

Corporation, et. al., 262 A.D.2d 1068, 4th Dept., 1999; *Popfinger v. Terminex Int'l Co. Ltd*, 251 A.D.2d 564, 2nd Dept., 1998).

D. Sufficiency of Dr. David Feiglin's Affidavit

Defendants contend that Dr. David Feiglin's Affidavit, which was submitted to prove causation of plaintiff David Rosecrans' injuries, is insufficient since it is based on reports not in evidence or of no probative value, and that it does not satisfy plaintiffs' legal burden of proof. More particularly, Dr. David Feiglin states in his affidavit that "it is more probable than not" that the ill effects suffered by plaintiff, Daniel Rosecrans, were caused by exposure to carbon monoxide.

Plaintiffs have submitted proof of the NYSEG carbon monoxide test results of 50 ppm., found in the basement of the premises on December 23, 1994. In rendering his opinion, Dr. Feiglin relied on various documents, reports and records, including, without limitation, the NYSEG test and the Affidavit of Roger L. Wabeke, who is board certified in the Comprehensive Practice of Industrial Hygiene, board certified at the Masters Level in Hazardous Materials Management, and who is a registered Professional Engineer.

In order for expert testimony to be properly admitted into evidence, it should be based on facts in the record or personally know to the expert, or facts derived from a "professionally reliable" source or from a witness subject to cross-examination. *Brown v. County of Albany*, 271 A.D.2d 819, 3rd Dept., 2000). The fact that the Dr. Feiglin used the words "more probable than not" when opining that plaintiff, David Rosecrans, suffered brain injuries from the alleged carbon monoxide exposure, is not dispositive. An expert can use such language provided that the expert intends to signify probability supported by some rational basis rather than mere speculation. *Duffen v. State of New York*, 245 A.D.2d 653, 3rd Dept., 1997).

Dr. Feiglin's opinion is based on documents, reports, and records that can be reasonably relied on by experts in the field when forming opinions or inferences upon a subject. In his affidavit, Mr. Wabeke represented that the carbon monoxide level of 50 ppm., found in the Rosecrans home, was excessive and exceeded maximum EPA allowable limits for an eight-hour exposure. Dr. Feiglin can rely on Wabeke's affidavit and the NYSEG report when forming an opinion as to causation.

Based on the foregoing, Dr. Feiglin's Affidavit is sufficient evidence of causation as to plaintiff David Rosekrans' injuries.

E. Other Issues

A. Frye/Daubert Hearing. Defendants' request a Frye/Daubert hearing with regard to testimony to be given by plaintiffs' experts, Dr. Buschsbaum, Dr. Feiglin, Dr. Griffiths, Dr. Tannenbaum, and Dr. Kovaleski. Defendants allege that the respective opinions to be offered by these various expert witnesses to establish causation between plaintiffs' injuries and carbon monoxide exposure should not be allowed since there is no generally accepted scientific evidence on which to base such opinions. A *Frye/Daubert* pre-trial hearing will be conducted to determine the admissibility of this evidence. (*Frye v. United States*, 54 App.D.C. 46, 293 F. 1013; *Daubert v. Merrell Dow Pharms.*, 509 US 579; *Middleton v. Kenny*, 286 A.D.2d 957, 4th Dept., 2001; *People v. Wesley*, 83 N.Y.2d 417).

B. Defendants' Discovery Demands. Defendants have asserted discovery issues: 1) Defendants request discovery regarding records of additional schools that plaintiff attended, to wit: Four Winds, Kids Peace, home schooling, and Minnick School in Roanoke, VA.. These are names of schools that plaintiffs have provided in their supplemental bill of particulars. Defendants are entitled to these records. 2) Defendants request information of

collateral sources previously demanded by defendants. Defendants are entitled to the same. 3) Defendants request reports with regard to alleged prior accidents and head injury of plaintiff, Lawrence Rosecrans. Defendants are entitled to these reports, and plaintiffs shall be required to provide these records, information and reports to defense counsel within 60 days after the entry of an Order on this Decision.

C. *Plaintiffs' Amended Bill of Particulars*. Defendants moved to have plaintiffs precluded from serving an amended bill of particulars since it was filed after the note of issue was filed. Under CPLR §3403 (b)(c), a party may serve a supplemental bill of particulars without court leave, with respect to continuing claims for special damages and disabilities, provided that no new injury or cause of action is alleged. The other party is allowed rights to discovery in such instance. The court may also grant leave to serve a supplemental bill of particulars [CPLR§3403 (b)]. Plaintiffs can serve their supplemental bill of particulars with regard to their claim for loss of earnings and for special damages for cost of care not covered by applicable federal programs or insurances. Defendants shall have 180 days after receipt of records with regard to plaintiffs' continuing claims, to complete discovery with respect to such claims. Furthermore, plaintiffs are directed to respond to defendants' demand for all medical expenses claimed and collateral source information. The balance of defendants' motion with regard to the supplemental bill of particulars is denied.

D. *Plaintiffs' Expert Disclosure*. Within 30 days after the entry of an Order on this Decision, Plaintiffs shall serve an amended expert disclosure with regard to Dr. Henning, setting forth the substance of the facts and opinions about which he will be giving an opinion.

CONCLUSION

By reason of the foregoing, defendants' motion for summary judgment is hereby denied, without costs, and defendants' motion with regard to a Frye/Daubert Hearing, additional discovery as stated herein above.

SUBMIT ORDER.

Dated: March 31, **2006**
At Auburn, New York

Mark H. Fandrich

HON. MARK H. FANDRICH
Acting Supreme Court Justice