STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

DAVID JAZYLO, MARIBEL JAZYLO, ANTONIO E. GALARZA, by and through his p/n/g MARIBEL JAZYLO, and ELISA M. GALARZA, by and through her p/n/g MARIBEL JAZYLO,

Plaintiffs,

-against-

Index No.: 05-2482
RJI No.: 55-05-02056

ARTHUR LEONG and GERRY CARRASCO,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs commenced this action seeking to recover for injuries allegedly sustained

from exposure to molds growing in a two family residence which was originally owned by defendant Leong and then conveyed to defendant Carrasco a few months before this action was commenced. Defendant Leong has moved for summary judgment dismissing the complaint on the sole ground that a lower court found in a Frye hearing that the plaintiffs therein had failed to offer sufficient proof that their experts' opinions were generally accepted by the relevant scientific community. Defendant Carrasco has cross-moved for summary judgment dismissing the complaint on the same ground, as well as the additional grounds that he did not breach any duty to plaintiffs, that plaintiffs executed a lease establishing that the premises were in good order, and that plaintiffs assumed the risk.

Pursuant to CPLR 3212 (a), a motion for summary judgment must be made at the latest within 120 days after filing of the note of issue unless good cause is shown (see Brill v City of New York, 2 NY3d 648 [2004]). The note of issue herein was filed on August 3, 2006. The primary motion was not made until December 11, 2006, more than 120 days after filing of the note of issue. The cross-motion was not made until February 13, 2007. Defendant Leong's attorney has alleged that he relied upon the information contained on the New York State Unified Court System's internet data base, which stated that the note of issue was filed on August 14, 2006. While such data is incorrect, the Court finds that defendant Leong has shown good cause for the minimal delay in bringing the motion. Accordingly the Court will address the motion on the merits.

Defendant Carrasco has not offered any excuse whatsoever for his substantial delay in making the cross-motion. The fact that the cross-motion is untimely warrants denial without consideration of the merits (see Rocky Point Drive-In, L.P. v Town of Brookhaven, 37 AD3d 805 [2d Dept 2007]), especially since the cross-motion raises numerous grounds not addressed in the original motion (cf. Grande v Peteroy, __ AD3d ___, 2007 NY Slip Op 03098 [2d Dept 2007]). In any event, as discussed infra, the cross-motion is without merit. Accordingly, the cross-motion shall be denied in all respects.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). The motion is not a vehicle to challenge the opposition to prove its case. It is only when the movant has established a

right to judgment as a matter of law that the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Defendant Leong has submitted only an attorney's affidavit annexing copies of the pleadings, the bill of particulars and the decision of the Court in Fraser v 301-52 Townhouse Corp., (13 Misc 3d 1217[A] [Sup Ct, New York County 2006]). The affidavit from the attorney does not indicate that he has any personal knowledge of the facts. As such, the affidavit is not probative of any of its factual assertions (see Beckmann v 71 Speeder Road, LLC., 28 AD3d 1053 [3d Dept 2006]; Fallsburg Fishing & Boating Club v Spiegel, 9 AD3d 765, 766 [3d Dept 2004]; Bronson v Algonquin Lodge Assn., 295 AD2d 681, 682 [3d Dept 2003]). To the extent that defendant Leong contends that a plaintiff may never recover for injuries sustained from exposure to mold, the motion is entirely without merit.

The determination in Fraser v 301-52 Townhouse Corp. was based upon factual findings following a full and extensive Frye hearing. The determination is clearly limited

to the facts before that Court. Plaintiffs herein were not parties to such action and therefore are not bound by the determination. Defendant Leong has not offered any expert evidence indicating that plaintiffs are relying upon experimental, novel or unaccepted scientific theories and has not even met the burden of showing that a Frye hearing is warranted (see Saulpaugh v Krafte, 5 AD3d 934 [3d Dept 2004]; Tavares v New York City Health & Hosps. Corp., 2003 NY Slip Op 51278[U] [Sup Ct, Kings County 2003]), let alone the burden on a motion for summary judgment of conclusively establishing that plaintiffs' claims have no merit. Moreover, numerous cases have held that mere disagreements as to causation of a medical condition do not warrant a Frye hearing (see Nonnon v City of New York, 32 AD3d 91, 103, 108 [1st Dept 2006]; Lustenring v AC&S, Inc. 13 AD3d 69, 70 [1st Dept 2004]; Gayle v Port Auth. of N. Y. & N. J., 6 AD3d 183, 184 [1st Dept 2004]). It has also specifically been held that an action could go forward without a Frye hearing when plaintiffs alleged injuries as a result of exposure to molds in an office work place (see Sweeney v Purcell Constr. Corp., 20 AD3d 872, 873 [4th Dept 2005]). Furthermore, it has been held that medical testimony is probative and sufficient to raise an issue of fact as to whether a medical condition was proximately caused by exposure to molds (see Martin v Chuck Hafner's Farmers' Mkt., Inc., 28 AD3d 1065, 1066-1067 [4th Dept 2006]). As such, there is no merit to defendant Leong's unsupported contention that plaintiffs can not prove any injuries caused by the molds in their residence. Accordingly, the motion for summary judgment shall be denied.

Defendant Carrasco's cross-motion is supported by an attorney's affirmation, the pleadings, plaintiffs' bill of particulars and transcripts of the examinations before trial of the parties. As with the primary motion, there is no expert evidence indicating that plaintiffs' claims of causation are based upon experimental or novel theories. As such, there is no merit to that portion of the motion which asserts that plaintiffs can not prove that their medical conditions were caused by exposure to toxic molds.

Defendant Carrasco also relies upon the examinations before trial of the parties in support of his claim that he did not breach any duty to the plaintiffs. He contends that he purchased the premises in March of 2005. His testimony indicates that he was aware of the wet basement as of the time of closing, and in fact sought and obtained a price reduction as a result of such condition. Plaintiff David Jazylo complained to him about the condition a few weeks following the closing. Defendant Carrasco contends that he then remediated the problem by excavating the foundation, sealing it, and putting in drainage. However, he has not offered any dates as to when such work was performed, nor has he offered any proof that such work constituted an appropriate and effective method of curing the allegedly dangerous condition. There is no proof whatsoever that he undertook any actions to remove existing mold or sterilize the basement area. As such, he has failed to make a conclusive showing as a matter of law that he remedied the defective condition within a reasonable time after purchasing the premises.

Defendant Carrasco also relies upon a clause in the lease which plaintiffs allegedly

signed purportedly stating that the premises were "in good order, repair and a safe, clean and tenantable condition." The alleged terms of the lease are set forth in a memorandum of law which is unsworn and does not constitute admissible evidence. Defendant Carrasco has not submitted a copy of the lease so that the Court can ascertain which of the plaintiffs signed it and determine what the actual terms of the lease were. Moreover, the transcripts of the Jazylo plaintiffs indicate that they did not have enough money to move to a different home. As such, there are questions of fact as to whether they were pressured to execute the lease under circumstances of unequal bargaining power (see Morris v Snappy Car Rental, 84 NY2d 21, 30 [1994]). Moreover, the fact that defendant Carrasco sought and obtained a price reduction based upon the wet basement establishes that the premises were not as stated in the lease. The purported language is certainly not express and unambiguous so as to constitute a release of any claims plaintiffs might have.

Finally, defendant Carrasco contends that plaintiffs assumed the risk of injury by remaining in the premises after they knew of the dangerous condition. However, the doctrine of primary assumption of risk, which entirely bars recovery, is only applicable when the plaintiff is engaged in some sporting or recreational activity (see Hawkes v Catatonk Golf Club, 288 AD2d 528, 530 [3d Dept 2001]; Burleigh v General Elec. Co., 262 AD2d 774 [3d Dept 1999]; Stirpe v Maloney & Sons, 252 AD2d 871 [3d Dept 1998]) even when a plaintiff's occupation and experience establish a heightened awareness of the danger (see Roe v Keane Stud Farm, 261 AD2d 800, 801 [3d Dept

1999])[1]. Under the circumstances herein, assumption of risk may be considered as comparative fault, reducing, but not prohibiting, plaintiffs' recovery (see Stickles v Fuller, 9 AD3d 599, 601 [3d Dept 2004]; Comeau v Wray, 241 AD2d 602, 604 [3d Dept 1997]). Summary judgment to apportion such fault is clearly not warranted.

Accordingly it is

ORDERED that the motion and cross-motion for summary judgment dismissing the action are hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiffs, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
May 25, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated December 11, 2006; Affidavit of Michael T. Cook, Esq. sworn to December 11, 2006 with Exhibits A-E annexed;

Affirmation of Jeffrey M. Brody, Esq. dated December 18, 2006 with Exhibits A and D

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[1]Plaintiff David Jazylo is certified in water damage restoration, was employed in such field for six years prior to moving into the subject premises, and was familiar with the problems associated with mold.

annexed; Affidavit of Rick Regan sworn to December 27, 2006 with Exhibits B1-B2 annexed; Affirmation of Albert P. Hirdt, M.D. dated December 29, 2006 with Exhibits C1-C3 annexed;

Reply Affidavit of Michael T. Cook, Esq. sworn to February 23, 2007 with Exhibit A annexed;

Sur-Reply Affirmation of Jeffrey M. Brody, Esq. dated March 6, 2007;

Notice of Cross-Motion dated February 13, 2007; Affirmation of Donald J. Lambiase, Esq. dated February 13, 2007 with Exhibits A-K annexed;
Memorandum of Law dated February 13, 2007;

Affirmation of Jeffrey M. Brody, Esq. dated March 6, 2007.