

Fraser v 301-52 Townhouse Corp.

2007 NY Slip Op 32086(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0113586/2002

Judge: Shirley W. Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 113586/2002

FRASER, COLIN

vs

301-52 TOWNHOUSE CORP.

Sequence Number : 009

RENEWAL

INDEX NO. _____

MOTION DATE

3/15/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Motion to/for _____

PAPERS NUMBERED

1-6

7-10

11-12

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

FILED

JUL 09 2007

NEW YORK

COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FOR THE FOLLOWING REASON(S):

E

SUPPORT OFFICE

Dated 7/5/07

[Signature]

J.S.C.

MDAF

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: PART 54

-----X
COLIN FRASER, PAMELA FRASER and
ALEXANDRA FRASER, an Infant by her Parents And
Natural Guardians, Colin Fraser and Pamela Fraser,

Plaintiffs,

-against-

301-52 TOWNHOUSE CORP., and
JANICE JOINSON,

Defendants.
-----X

KORNREICH, SHIRLEY WERNER, J.:

Index No.: 113586/02

DECISION
and
ORDER

FILED

JUL 09 2007

NEW YORK
CLERK OF THE SUPREME COURT

Plaintiffs move, pursuant to CPLR §2221, to renew and reargue this court's decision and order, dated September 27, 2006 ("Decision").¹ The Decision dismissed plaintiffs' personal injury claims with prejudice, after a ten-day *Frye* hearing, on the ground that plaintiffs had not proved that it is generally accepted in the relevant scientific community, *i.e.*, specialists in occupational and environmental medicine, allergies and immunology, that plaintiffs' alleged injuries could have been caused by dampness in their cooperative apartment; or that the methodology used to measure airborne mold in their apartment is generally accepted in the scientific community. The Decision left intact plaintiffs' claims for breach of the warranty of habitability and property damage. The court wishes to emphasize that the *Frye* hearing only addressed causation of alleged physical injuries. The Decision made no determination regarding whether landlords are required to abate mold conditions in their properties, whether real property

¹Plaintiffs have not separately delineated their grounds for reargument and renewal, as required by CPLR §2221(f).

with a mold condition is habitable, or whether there is a public health risk where indoor mold is present. The issue in the *Frye* hearing was limited to whether the scientific community accepted plaintiffs' theory of *causation*, which is different from *risk* or *association*.

The grounds urged for reargument are: that the court erroneously ordered the *Frye* hearing in its earlier order, dated June 21, 2005; that under *Frye*, the court had no authority to determine whether plaintiffs' theory of causation was generally accepted in the scientific community when there are some experts who disagree with that conclusion; that the object of a *Frye* hearing is limited to determining whether a technique, as opposed to a theory, is generally accepted; that the court should have interpreted differently the scientific literature that plaintiffs put in evidence because plaintiffs now submit, for the first time, the affidavit of a scientist, who was not called as a witness at the hearing and who disagrees with the Decision's interpretation; and that the Court did not permit plaintiffs to call Edward Olmstead who tested the apartment for airborne mold, when, in fact, plaintiffs requested the court to permit their medical expert, Dr. Johanning to testify about Olmstead's report. The grounds for renewal are various publications that were published both before and after the hearing, and affidavits of witnesses who were not called by plaintiffs at the hearing. Further, plaintiffs contend that the court put too much weight on the position paper of the American Academy of Allergy, Asthma and Immunology, placed in evidence as Defendants' Exhibit E ("Exhibit E").² They now submit proof that, after the hearing, some scientists criticized both the position taken in the paper and the undisclosed bias of some of the scientists on the committee that authored it, although it is undisputed that the Academy did

²*The Medical Effects of Mold Exposure*, published in February 2006 in the *Journal of Allergy and Clinical Immunology*.

not alter position.

Reargument should be granted where the movant demonstrates that the court “misconstrued relevant facts or misapplied governing law.” *DeSoignies v. Cornasesk House Tenants’ Corp.*, 21 A.D.3d 715, 718 (1st Dept. 2005). A reargument motion is not a do-over. It should not be a vehicle to rehash arguments already made or to advance new arguments or present different evidence that was available at the time of the original application. *James v. Nestor*, 120 A.D.2d 442 (1st Dept. 1986); *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979). For the reasons that follow, plaintiffs’ motion for reargument is solely for the purpose of modifying the Decision to the extent that it relied upon the reliability of Olmstead’s testing, but the court adheres to its original determination.

In addition, the court grants renewal based upon the decision in *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 450 (2006), which was decided after this court’s Decision following the *Frye* hearing and, upon renewal, holds that defendants are entitled to summary judgment dismissing plaintiffs’ claims for physical injuries for the additional reason that their expert’s opinion lacks sufficient foundation to prove specific causation.

A. *Reargument*

Essentially, plaintiffs claim that the court erred because it decided that the scientific community does not generally accept that there is a cause and effect relationship between exposure to damp/moldy indoor spaces and the development of upper respiratory and allergic-type symptoms. Plaintiffs claim that the court should have found that causation was generally accepted in the scientific community because the literature, most of which was put in evidence by plaintiffs themselves, concluded that there is an association between damp/moldy indoor spaces

and upper respiratory symptoms and allergic-type reactions. Plaintiffs now claim that the court should not have held a *Frye* hearing because there was no novel question of science for the court to consider.

At the hearing, plaintiffs alleged that their injuries were caused by mold, and “excessive moisture” and “dampness,” leading to “atypical microbial contamination.” There was expert testimony by Dr. Johanning about mold microbial by-products, such as MVOCs and beta glucans, which are released into the ambient air and can be an irritant. However, the Fraser apartment was not tested for MVOCs and beta glucans and there was no proof that there were mold by-products found in the apartment’s air.

Throughout this case, plaintiffs’ alleged injuries have been a moving target, which made it difficult to pinpoint what exactly was alleged to have been caused. At one point, when pressed by the court to identify the injuries in the bill of particulars still claimed by his clients, plaintiffs’ counsel was unable to respond, telling the court that plaintiffs were claiming “whichever [symptoms] Dr. Johanning testified to.” Tr. 3/28/06 at 30-41. Counsel repeated that stance in a letter to the court in connection with this motion, dated June 28, 2007, stating that the court should rely on the “entire record” instead of asking plaintiffs to identify the injuries on an “ad hoc” basis.

Initially plaintiffs claimed cognitive deficits, infertility, asthma, headaches, cough, sore throat, fatigue, psychological injuries, itchy and swollen eyes, nasal congestion, asthmatic symptoms, upper respiratory infections, frequent cough, and rashes.³ The evidence and testimony

³Plaintiffs’ main expert, Dr. Ekhardt Johanning, has testified in other cases where courts have rejected some of his more unique theories on injuries that can be caused by mold. See, *MacGregor v. Born*, 21 Mass. L. Rep. 353 (Mass. Super. Ct. 2006)(autism); *Allen v. IBM*, 308 F.

at the hearing did not establish that plaintiffs were diagnosed by their experts with many of those symptoms. At some point after serving their expert disclosures, plaintiffs abandoned their claims for infertility and cognitive defects. Then during the hearing, plaintiffs enlarged their alleged upper respiratory symptoms, over the objections of defense counsel, to include rhinitis and sinusitis. There was also dispute during the hearing as to whether fatigue was one of the injuries. Plaintiffs' experts were allowed by the court to testify, again over defense objection, that fatigue was often a result of upper respiratory symptoms that interfered with sleep. While the hearing was underway, plaintiffs' counsel admitted that there was "no claim that anyone has asthma." Tr. 7/11/05 at 263-264. Dr. Johanning testified that plaintiffs had allergic rhinitis and sinusitis, Tr. 7/11/05 at 237, although his medical reports did not diagnose plaintiffs with those conditions, Tr. 8/1/05 at 39-45. In his reports the diagnosis was that plaintiffs suffered from allergic and irritant "type reactions" *id.*, but there was no proof that plaintiffs were diagnosed with allergies to mold or asthma, Tr. 7/11/05 at 332, 347 and 353. In fact, the Frasers did not have IgE antibodies to mold, which are markers for the presence of allergic reaction, according to Dr. Ehrlich. Dr. Johanning testified that part of his methodology included blood test for IgG and IgE antibody levels to diagnose allergic reaction, but plaintiffs' second expert, Dr. Ehrlich, testified that IgG levels "are not necessarily an indication of disease." Tr. 7/12/05 at 356. Dr. Johanning himself concurred that IgG levels are not necessarily an indication of disease. Tr. 8/1/05 at 68. There was proof that Mrs. Fraser was allergic to cats and dust mites and that the Frasers lived with several cats. Ultimately, the hearing revealed that plaintiffs' alleged injuries boiled down to allergic and irritant type reactions, with

Supp.2d 638 (D.C. North Carolina 2004)(vertigo, sensitivity to motion and visual stimuli, suppressed immune systems, chronic fatigue, muscle spasms and significant cognitive disorders); *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 239 (Tex. App. 2002)(toxic encephalopathy).

associated fatigue (a claim that nasal congestion interfered with sleep), and possibly rhinitis and sinusitis, other names for upper respiratory congestion.

No witness called by plaintiffs defined dampness or excessive moisture, or related the dampness in plaintiffs apartment to the amount of dampness found in the scientific literature, which ranged from floods to sewage leaks to small water incursions. The novelty of plaintiffs' theory of causation was bolstered by the testimony of their own expert, Dr. Ehrlich, who stated that there is no objective criteria for what constitutes a damp building. Tr. 7/12/05 at 357. Similarly, the text upon which the court placed the most reliance, *Damp Indoor Spaces and Health* ("*Damp Spaces*"), Plaintiffs' Exhibit 23 in evidence, also states that there is no generally accepted definition for "dampness."

Plaintiffs now offer the affidavit of a toxicologist, Harriet Ammann ("*Ammann*"), a different specialty than the experts plaintiffs presented at trial, who was on the panel of scientists that authored *Damp Spaces*. Dr. Ammann's affidavit rests on the erroneous assumption that *Damp Spaces* found a "strong association" between damp indoor spaces and respiratory symptoms and disease. Plaintiffs do not offer an excuse, or even a reason, for failing to call Ammann at the hearing, which alone is a reason to deny reargument. The court declines to consider her affidavit on reargument. Similarly, the affidavits of Dr. Johanning and Mr. Olmstead will not be considered. Dr. Johanning testified at the hearing and Mr. Olmstead could have testified, was not called.

As stated in the Decision, the conclusion reached in *Damp Spaces* contradicts plaintiffs' assertion that there is a causal link between upper respiratory symptoms and damp/moldy indoor environments. *Damp Spaces* found an "association," which, according to the evidence before the

court at the hearing, is less than a strong association, between damp/moldy indoor spaces and respiratory symptoms. The court struggled with the issue that plaintiffs press upon reargument, whether general acceptance in the scientific community of an association is enough to prove general acceptance of causation. The defense presented witnesses who stated that association was not the same as causation. Dr. Johanning, upon questioning by the court, also testified that causation and association are not the same. Tr. 8/1/05 at 49-51. Dr. Stanley Michael Phillips testified for the defense that a strong association means that an association occurs all the time. Tr. 3/28/06 at 60. He defined association as meaning that two events come together: a weak association means that they come together a little bit, a medium association means most of the time, and a strong means all the time. *Id.*

After the hearing, the Court of Appeals in *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 450 (2006), dismissed a complaint because there was “no significant association” between exposure to gasoline and the disease plaintiff developed, acute myelogenous leukemia (“AML”). The statement implies that a “significant association” could support a finding of causation, which is consistent with Dr. Phillips testimony that a strong association occurs all of the time.

However, the evidence at the hearing did not support the conclusion that the scientific community agrees that there is a “significant association,” which the court interprets as equivalent to a “strong association” between allergic and irritant type reactions and respiratory symptoms, or fatigue. Some of the scientific literature found a strong association with respect to asthma in children, but the Fraser child did not have asthma. The alleged injuries in this case at most were accepted in the scientific community as having an association with dampness and mold. In addition, *Parker* rejected Ammann’s new (and belated) assertion that the court should find

causation based upon an association that would be acted upon by public health officials and epidemiologists. The Court of Appeals held in *Parker* that “standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.” *Id.* at 450.

Plaintiffs also criticize this court’s interpretation of the voluminous scientific literature introduced at the hearing. At various points during the ten-day hearing, the court specifically asked plaintiffs’ counsel whether he was going to have testimony to explain the scientific literature he was placing in evidence. Ultimately, plaintiffs did not present testimony related to most of the articles. The court read them because they were in evidence, and the majority were introduced by plaintiffs. Realizing its limitations, in the end, the court relied most heavily on *Damp Spaces*, the seminal book on the subject, quoting extensively from its conclusions. Plaintiffs offered this book in evidence and it was accepted without objection. Tr. 8/1/05 at 14-15. Plaintiffs also put in evidence other entire books during the hearing, thanking the court for going through them to determine which ones were relevant to plaintiffs’ injuries. Tr. 7/8/05 at 160-163. On this motion, while complaining about the court’s interpretation of literature, again plaintiffs submit 27 articles, most of which were published before the close of the hearing, leaving it largely to the court to interpret their findings.

Damp Spaces was a scientific review, conducted in accordance with the rules of the National Research Council’s Report Review Committee, and compiled by a committee of experts from the Center for Disease Control. The text reviewed the scientific literature through 2002, regarding the relationship between damp/moldy indoor environments and the manifestation of adverse health effects, particularly respiratory and allergic issues, by evaluating them for relevance, scientific methodology, validity, bias and confounding factors. The conclusion drawn by the

review of the available literature was that evidence in 2003 was insufficient to conclude that a causal relationship exists between health outcomes and damp/moldy indoor environments, which was a formal position adopted by the committee of experts. In other words, the committee differentiated association from causation and found that the scientific evidence supported only the former, and that only as to upper respiratory tract symptoms, cough, wheeze and asthma symptoms in sensitized asthmatic people.⁴

Not only did plaintiffs' fail to establish general acceptance of their theory of injury causation, but they did not demonstrate that scientists generally accept that there is a level of *indoor* airborne mold known to cause illness. There is a striking similarity between the testimony of plaintiffs' experts and the vague expert testimony rejected by the Court of Appeals in *Parker*, where the experts spoke of "excessive" and "frequent" exposure or stated that the exposure was "far more" than the exposure of workers in epidemiological studies. Here, plaintiffs offered less: their experts and literature did not quantify or define any amount of airborne mold or dampness that could cause illness. It follows that there were no reliable methods or standards for accurately measuring the amount of exposure that allegedly led to plaintiffs' respiratory problems.

In sum, the court adheres to its original determination that plaintiffs' theory of causation is not generally accepted in the scientific community. The court does not believe that *Frye* turns on how many "peer reviewed" books and articles, no matter where published, one side can find to place into evidence. Nor does disagreement by some experts prove that there is general acceptance of a scientific theory.

Plaintiffs' claim that the court erred in not permitting Olmstead to testify is unavailing.

⁴The Frasers did not have asthma.

The record reflects that, over defendants' objection, the court permitted Dr. Johanning to testify about Olmstead's methodology because Mr. Olmstead was unavailable and plaintiffs' counsel stated that Dr. Johanning was intimately familiar with Olmstead's methodology. Tr. 7/8/05 at 129-143.

Finally, although plaintiffs claim that the court should not have considered evidence from disciplines other than environmental and occupational medicine, Dr. Johanning's specialty, they themselves presented evidence from the other disciplines considered by the court.

However, one correction to the Decision should be made. Plaintiffs are correct that whether a generally accepted method of testing is properly performed is beyond the scope of a *Frye* hearing. *People v. Wesley, supra*. Therefore, the court retracts its statements in the Decision regarding the air testing on a single day with air conditioning or heating running. However, the *Frye* determination stands with respect to the propositions that there are no generally accepted levels at which airborne mold is known to cause illness and that there are no reliable standards for measuring airborne indoor mold.

B. Renewal

In the original motion that resulted in the order of June 21, 2005 directing the *Frye* hearing, defendants moved for summary judgment dismissing plaintiffs' claims for personal injuries on the ground that plaintiffs could establish neither general nor specific causation. *See*, Order to Show Cause, dated May 17, 2005. Plaintiffs now assert that the court erred in directing the *Frye* hearing. The court now believes that it should reconsider its denial of defendants motion for summary judgment because plaintiffs' experts will not be able to establish specific causation of their physical injuries, as defined in *Parker v. Mobile Oil Corp., supra*. The court is permitted to grant a

motion to renew based upon new precedent, pursuant to CPLR 2221.

Parker clarified rules for the foundation necessary to admit expert evidence, which are unrelated to the *Frye* standard for proving general causation for a novel scientific method or theory:

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 the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation).

Parker v. Mobil Oil Corp., *supra* at 448. The Court of Appeals suggested methods of proving causation including the intensity of exposure, an estimate of exposure through mathematical modeling, or a comparison of exposure levels of subjects of other studies. *Id.* at 449. General causation was not proven at the *Frye* hearing, as previously noted.

Turning to specific causation, the Olmstead testing found airborne and surface indoor mold, dominated by *aspergillus versicolor*, which, according to Dr. Johanning, could become airborne and emit irritants that could be inhaled. Dr. Johanning said the mere presence of this "atypical" mold was enough to cause plaintiffs' symptoms. Further, plaintiffs were not diagnosed with allergies to mold, although Mrs. Fraser was found to have allergies to cats and dust mites. Since plaintiffs had no mold allergies, allergic type and irritant reactions could not have been related to mold allergies activated by an exposure.

Plaintiffs attempted to make a case for specific causation through Dr. Johanning's testimony that he used the method of "differential diagnosis." He claimed that since there exists an association between mold and symptoms, the patient's history of exposure to mold allows him, using clinical judgment, to make a differential diagnosis that mold or its microbial by-products

caused the symptoms. In this court's opinion, this turns causation on its head.

A differential diagnosis is a list of possible causes of a symptom. A cause should not be ruled in without a scientific basis for believing that there is general causation: a cause and effect relationship. Additionally, a cause should not be ruled out if there is a scientific basis to believe that the patient's symptoms could be caused by it. Dr. Johanning testified without underlying proof of causation or strong association, without proof of mold allergies, without reliable standards for measurement of airborne exposure, and without measurements of mold by-products that plaintiffs' symptoms must have been caused by airborne mold and mold by-products. On the other hand, with respect to Mrs. Fraser, he failed to rule in cat and dust allergies.

Although some judicial opinions presented by plaintiffs on this motion have agreed that Dr. Johanning's differential diagnosis has validity, other courts, which this court finds more persuasive, have disagreed. For example, in *Jazairi v. Royal Oaks Apt. Assocs., L.P.*, 217 Fed. Appx. 895, 897-898 (11th Cir. 2007), the 11th Circuit excluded Dr. Johanning's opinion on the ground that his differential diagnosis failed to rule out mold in the absence of confirmed allergy, and failed to rule in other causes like smoking and pet dander. In addition, the 11th Circuit noted that Dr. Johanning's opinion was based solely on temporal proximity to mold and anecdotal evidence, as it was in this case. *See also, Roche v. Lincoln Prop. Co.*, 278 F. Supp. 2d 744 (D. Va. 2003)(without tests proving allergy to specific molds found in apartment, allergy to mold should not be ruled into differential diagnosis). This court agrees with the 11th Circuit that the talisman of differential diagnosis is not a substitute for underlying science proving that there is causation to rule in a diagnosis. Defendants' motion for summary judgment should have been granted because Dr. Johanning's opinion lacks sufficient foundation for it to be the subject of expert testimony.

Therefore, there is no evidence to link plaintiffs' physical injuries to the mold in their apartment.

With respect to the new evidence that Exhibit E was not reliable, the court notes that the President of the American Academy of Allergy Asthma and Immunology confirmed the position taken in the paper. The fact that some scientists do not agree with the position in *Damp Spaces* merely demonstrates that there is controversy, not that causation is generally accepted. Unanimity is not required for a finding of general acceptance. *People v. Wesley*, 83 NY2d 417, 423 (1994). Accordingly, it is

ORDERED that plaintiffs' motion to reargue is granted and, upon reargument, the court adheres to its original determination with a modification as to reasoning as set forth in this opinion; and it is further

ORDERED that plaintiffs' motion to renew is granted and, upon renewal, the court adheres to its original determination and, in addition, grants defendants' motion for summary judgment dismissing plaintiffs' claims for physical injuries upon the further ground that plaintiffs' experts could not establish specific causation; and it is further

ORDERED that the parties are directed to appear for trial on September 17, 2007, at 111 Centre St., Part 54, Room 1227 at 10:00 a.m.

Dated: July 5, 2007

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