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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice PART Part 5

Index Number : 123370/2001
MARQUEZ, RAYMOND
VS
CITY OF NEW YORK
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3,4,5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 24, 2007

EILEEN A. RAKOWER J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

RAYMOND MARQUEZ,

Plaintiff,

- against -

Index No.
123370/01

THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF CORRECTIONS

Decision and Order

Defendants.

Mot. Seq. 005

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly suffered as a result of exposure to second hand smoke for twenty nine months, from August 1998,through January, 2001, specifically, during the time Plaintiff was incarcerated in various New York City Department of Corrections (City) jails. Mr. Marquez was diagnosed with bladder cancer in September 2000. Plaintiff claims that his bladder cancer was caused by his exposure to second hand smoke (SHS) during his incarceration in those jails. City brings this motion for summary judgment claiming that Plaintiff cannot meet his burden to establish either causation or lack of contributory negligence because Plaintiff smoked cigarettes for thirty years and had bladder problems prior to his being stricken with cancer. In the alternative, City seeks a *Frye* hearing (*Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013 [C.A.D.C. 1923]), to establish that the methodology used by one particular expert does not generate results that would be viewed as accurate in the relevant scientific community. City argues that Plaintiff's experts' theory that there is a connection between bladder cancer and SHS is not a generally accepted belief in the relevant scientific community. Plaintiff opposes these motions.

City, in support of its motion, provides the pleadings in this matter, a 2006 report of the Surgeon General regarding second hand smoke, selected portions of Plaintiff's deposition testimony, portions of a 1997 tax tribunal determination, a report from second hand smoke consultant James L. Repace, two reports from Plaintiff's experts, urologist Dr. Dudley S. Danoff and oncologist Dr. Reed E

Phillips, a report from City's expert, Dr. Mark Wishnuff, affirmations of Corporation Counsel, a 2005 California Environmental Protection Agency assessment of the health effects of SHS and two trial level decisions rendered after *Frye* Hearings.

Plaintiff provides counsel's affirmations in opposition, the deposition of Plaintiff, the bill of particulars, a transcript from Plaintiff's continued independent medical exam (Plaintiff's counsel insisted that a stenographer be present for the independent medical examination), an affidavit from Plaintiff, a rebuttal submission from Mr. Repace in further support of his report, affidavits from both of Plaintiff's Doctors disputing City's position as well as the position of City's expert, a 2004 report of the Surgeon General regarding the health consequences of smoking, excerpts from *Attorneys Medical Advisor*, an article from the *Journal of the National Cancer Institute*, an article from the *American Journal of Public Health*, further rebuttal from Mr. Repace, excerpts from the depositions of two New York City Department of Corrections employees, a stipulation between the parties, an affirmation from the Deputy Commissioner for the Department of Health and Mental Hygiene, and the affidavit of a Department of Corrections Captain.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement nor are bald, conclusory allegations, even if believable. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249 [1st Dept. 1989]). The moving party's burden cannot be sustained merely by pointing out gaps in the plaintiff's case. (*Valdez v. Aramark Services Inc.*, 23 A.D.3d 748 [2nd Dept. 2005] *citations omitted*).

City argues that even if Plaintiff can prove that he was exposed to SHS, he cannot prove that SHS caused his bladder cancer or that he was exposed to enough SHS during his twenty-nine month incarceration to cause his illness. City claims that Plaintiff's repeated contention that he quit his 30 year smoking habit 25 years ago is belied by the fact that he purchased 420 packs of cigarettes during his twenty nine

months in City jails. City maintains that there is no consensus in the scientific community that SHS causes bladder cancer, as distinct from other types of cancer for which there is consensus regarding SHS. Further, City's expert argues that the latency period for bladder cancer is far longer than the twenty nine months that Plaintiff spent in City jails and therefore, his illness could not have been caused by his most recent incarceration. City points out that Plaintiff's experts do not address Mr. Marquez's two prior multi-year incarcerations at Federal correctional facilities and do not discuss the possible effect of those SHS exposures on Plaintiff's present condition. Finally, City charges that Mr. Repace's research methods, upon which Plaintiff's other two experts largely depend, rely on baseless assumptions and are faulty. City concludes a *Frye* hearing is necessary to determine the general acceptability of Mr. Repace's methodology in the scientific community.

Plaintiff contends that whether or not he was exposed to damaging levels of SHS and whether he actually smoked the cigarettes that he bought during his incarceration are both issues of fact for the jury. He argues that a *Frye* hearing is unnecessary because, as his two medical experts attest, Mr. Repace's methodology, using "relatively precise exposure analysis" and a "generally accepted computer modeling" method, enables him to extrapolate the degree of Plaintiff's exposure to SHS.

Plaintiff, in opposition to a motion for summary judgment must only raise a triable issue of fact as to whether his most recent incarceration proximately caused his cancer and the issue of "[p]roximate cause is almost invariably a factual issue." (*Monell v. New York,* 84 A.D.2d 717 [1st Dept. 1981]). Also, the issue of "comparative negligence is a jury question in all but the clearest cases" *(Rios v. Johnson,* 17 A.D. 3d 654, [2nd Dept. 2005] quoting *O'Neill v. Mildac Props.*, 162 A.D.2d 441 [2nd Dept. 1990]). This is so even if there have been other intervening factors. (*Id.*) Since the Court's function is one of issue finding rather than issue determination and the credibility of the parties is properly left to the fact finder, (*Creighton v. Milbauer,* 191 A.D.2d 162 [1st Dept. 1993] *citations omitted*), City's motion for summary judgment must be denied. Indeed, Justice Michael Stallman, deciding an earlier motion made in this matter, already noted "[o]f critical importance in this case are the mixed issues of proximate causation and contributory causation. i.e., plaintiff's prior health habits and medical history which are . . . trial issues."

It is Mr. Repace's methodology in quantifying Mr. Marquez's exposure to SHS by use of mathematical modeling, which is the object of City's request for a threshold hearing. City seeks to discredit Mr. Repace's "risk assessment" of Plaintiff's exposure to SHS and his Doctor's opinions as "speculative science [that] is not admissible as evidence in court."

The Court of Appeals in *Parker v. Mobil Oil Corporation.*(7 N.Y.3d 434 [2006]) noted that "it is simply inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiff's their day in court." (*Id.* at 447). The Court maintained that an expert would nonetheless have to be able to quantify plaintiff's exposure. The Court conceded that the quantification need not be precise, rather, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's . . . history into account to estimate the exposure to a toxin." (*Id.* at 449).

Plaintiff opposes the threshold hearing, pointing out that Mr. Repace has been permitted to testify as an expert in other jurisdictions. The court notes that Plaintiff's opposition is based on the submission of Georgia attorney John Moss, Esq., which attests that, after a *Daubert* motion (509 U.S. 579 [1993]), Mr. Repace testified as an expert in the State of Georgia.

New York, unlike the State of Georgia, remains a *Frye* jurisdiction, which asks "the elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." (*People v. Welsey,* 83 N.Y.2d 417 [1993]). *Frye* highlights that the premature admission of certain "scientific techniques" may "prejudice[] litigants and short-circuit[] debate necessary to determination of the accuracy of a technique." (*Id.* at 437, n.4, Kaye, J. *concurring*). *Frye's* scrutiny avoids the "pitfalls of self-validation by a small group" (*Id.* at 439, *citations omitted*). *Daubert*, by contrast, employs a standard which eschews "the rigidity of the 'general acceptance' rule" instead embracing "the 'liberal thrust' of the Federal Rules [of Evidence] and their 'general approach of relaxing the traditional barriers to 'opinion testimony' " (*Id.* at 423, n.2, *citations omitted*).

Justice Michael Stallman, in his decision and order dated March 29,2005, noted "that there does not appear to be any disagreement between the parties that smoking is prevalent in various prison areas, or that a large body of scientific evidence has indicated that exposure to second hand cigarette smoke can pose health hazards." The purpose of expert testimony is to provide specialized knowledge which enables jurors to draw conclusions regarding issues that are beyond their experience and common knowledge. (*People v. Cronin,* 60 N.Y.2d 430 [1983]). It remains the providence of the jury to make the ultimate determination of fact in a case.

Plaintiff presents the affidavit of Dr. Dudley Seth Danoff who opines that plaintiff's exposure to SHS in amounts consistent with Mr. Repace's assessment was "sufficient to exacerbate or otherwise be a competent contributing cause of Mr. Marquez's developing disease." Additionally, Dr. Reed E. Phillips "can categorically state to a high degree of medical certainty that the exposure of a person's lungs to a high level of secondhand tobacco smoke contamination of the environment significantly increases the chance of contracting bladder cancer." He then goes on to conclude that "it is far more probable than not on a medical basis that Plaintiff's exposure to dense secondhand smoking in the prison system was a casual [sic] factor in the development of Mr. Marquez's bladder cancer. Plaintiff has raised a triable issue of fact on the issue whether SHS exposure in the City jails and re-exposure after cessation of exposure proximately caused Mr. Marquez's cancer. Because the issue of the "admissibility and bounds of expert testimony" is properly left to the discretion of the trial court, City's motion for a *Frye* hearing is respectfully referred to the trial Judge.(*People v. Cronin,* 60 N.Y.2d 430, 433 [1983]).

Wherefore, it is hereby

ORDERED that City's motion for summary judgment dismissing all claims against it is denied; and it is further

ORDERED that City's motion requesting a *Frye* hearing in this matter is respectfully referred to the Trial Court.

All other relief requested is denied.

This constitutes the decision and order of the court.

DATED: July 24, 2007

EILEEN A. RAKOWER, J.S.C.