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

PRESENT: HON. LELAND DEGRASSE PART 25

0602947/2003

JAGGER, BIANCA
vs
KATZ PARK AVENUE CORP.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ # 019
VACATE STAY/ORDER/JUDGMENT

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

FILED
JAN 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

JAN 11 2008

Decided per the memorandum decision dated
which disposes of motion sequence no. 019

JAN 11 2008

Dated: _____

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

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

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BIANCA JAGGER,

Plaintiff,

-against-

Index No. 602947/03

KATZ PARK AVENUE CORP., et al.,

Defendant.

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DeGrasse, J.:

Motion sequences 017 and 019 are consolidated. Defendants Katz Park Avenue Corp., Residential Management Group, LLC and B&H Associates of New York, LLC (collectively "the Katz defendants") move and defendant A. J. Clarke Real Estate Corp. cross-moves for an order dismissing the second cause of action pursuant to CPLR 3212, precluding certain testimony by plaintiff's expert witnesses and directing the release of money deposited with the Clerk of the Court. The Katz defendants further move pursuant to CPLR 3104 (d) for a review of a determination by Special Referee Lancelot Hewitt. Under the second cause of action, plaintiff claims to have been injured as a result of exposure to mold and other microbial growth in an apartment leased to her by the Katz defendants and managed by Clarke. According to her affidavit, plaintiff began to reside in the apartment in 1988. She claims to have been forced to vacate the apartment in 2002 due to its mold contamination. The bill of particulars cites respiratory and other ailments which were allegedly caused by exposure to mold in the apartment.

In seeking summary judgment, defendants argue as follows:

> "Mold exposure cannot cause the vast array of ailments alleged by Plaintiff. At best, mold reactions can cause irritant responses such as allergy symptoms . . . However, Plaintiff's medical records conclusively demonstrate that she is not allergic to molds. And she does not suffer from any mold-related illness . . . Specifically, Plaintiff's IgE [Immunoglobulin E] and IgG [Immunoglobulin G] levels showed no allergies to molds and no hypersensitivity pheumonitis . . . Thus, Plaintiff cannot

> demonstrate that the presence of, or exposure to, mold in a residential setting causes the types of ailments for which she is seeking money damages . . . nor can Plaintiff show that mold exposure in the Apartment (again, as opposed to anywhere else) caused her specific alleged injuries."

Causation in a toxic tort case requires a showing that a plaintiff was exposed to a toxin, that the toxin is capable of causing the particular illness (general causation) and that the plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). Plaintiff submits the affidavit of Dr. John Santilli who opines that she suffered from symptoms associated with allergic rhinitis, sinusitis and asthma secondary to indoor mold exposure. Upon testing, Dr. Santilli found that plaintiff had a positive reaction to *Penicillium*, *Saccharomyces, Aspergillus* and *Cladosporium*. Colonies of these molds in the apartment were reported upon environmental testing by Olmstead environmental Services, Inc., Tiffany-Bader Environmental, Inc. and Microencologies, Inc. Accordingly, there is a triable factual issue as to whether the ailments plaintiff reports were caused by exposure to mold in the apartment.

Defendants alternatively seek an order precluding the testimony of Drs. Ritchie Shoemaker and Damien Downing. Dr. Shoemaker opines that plaintiff suffers from "a chronic biotoxin associated illness marked by chronic inflamation from innate immune responses elements [sic] caused by exposure to the interior environment of a building with water damage (WDB) that contains amplified growth of microbes, including but not limited to fungi, bacteria, mycobacteria, actinomycetes, proteinases, hemolysins, beta glucans, volatile organic compounes that are toxigenic, and/or elicit a pro-inflammatory innate immune response." Dr. Shoemaker further opines that the name of plaintiff's illness is irrelevant in that it is found only in patients with chronic biotoxin-associated illnesses. Dr. Downing, who performed no objective tests, similarly opined that plaintiff's tenderness on pressure over all of her sinuses, inflamation of her nasopharynx and moist breath sounds at the base of her lungs were due to hypersinsitivity reactions.

Expert testimony is admissible provided that the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community (*see Frye v United States* 293 F 1013 [D. C. Cir. 1923]; *People v Wesley,* 83 NY2d 417, 422-423 [1994]). The focus of the *Frye* test is to distinguish between scientific principles which are "demonstrable" and those which are "experimental" (*People v Wesley* at 422). Generally accepted reliability of proffered testimony can be demonstrated through scientific or legal writings, judicial opinions, or expert testimony other than that of the proffered expert (*Parker v Mobil Oil Corp.,* 16 AD3d 648, 651 [2005] *affirmed* 7 NY3d 434 [2006]). One particular judicial opinion is instructive. In *Montgomery Mutual Insurance Company v Chesson* (399 Md 314, 923 A2d 939 [2007]) the Maryland Court of Appeals held that under Maryland law a *Frye-Reed* hearing should have been held with respect to Dr. Shoemaker's similar testimony regarding a causal link between mold exposure and something he calls "sick building syndrome."[1] Citing several cases, the *Montgomery Mutual* Court recognized that the *Frye* test has been applied in courts across the United States to determine the admissibility of expert medical testimony that mold exposure causes illness (*id.* at 330). Dr. Shoemaker even concedes at page 50 of his affidavit that "the science of mold illness is relatively recent." Accordingly, a *Frye* hearing is warranted with respect to the testimony of Drs. Shoemaker and Downing.

In a related summary proceeding (*Katz Park Avenue Corp. v Jagger,* index number L&T 084904/03), plaintiff deposited rent due with the Clerk of the Civil Court of the City of New York pursuant to a stipulation. According to defendant's memorandum of law, the summary proceeding and this action were consolidated. Defendant seeks an order releasing the deposited funds on the ground that the alleged conditions which existed in the apartment have been remedied. The

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[1]*See Reed v State,* 283 Md 374, 391 A2d 364 [1978]).

stipulation, however, provides for the release of the monies deposited upon further stipulation or the entry or final judgment, neither of which has occurred.

By order dated July 31, 2007, the special referee denied defendants' motion for leave to reargue a CPLR 3126 motion which had been denied by another order dated July 10, 2006. The record supports the special referee's conclusion that plaintiff substantially complied with his discovery directives.

For the foregoing reasons, defendants' motion and cross motion for summary judgment are denied. The motion and cross motion are further denied to the extent that defendants seek an order releasing the monies deposited with the Clerk. The motion for a review of the special referee's determination is granted. Upon such review, the court declines to disturb the special referee's rulings. The motion and cross motion are granted to the extent that *Frye* hearings shall be conducted with respect to testimony to be given by Drs. Shoemaker and Downing. The hearings will be scheduled at the first pretrial conference. A note of issue shall be filed on or before March 31, 2008.

Dated: January 11, 2008