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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

PATRICIA SWEENEY,

Plaintiff,

SUBMISSION DATE: 5/13/08
INDEX No.: 4983/05

-against-

GREAT NECK TERRACE OWNERS CORP., AND CENTURY OPERATING CORP.

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, Defendants motion pursuant to Civil Practice Law and Rules § 3212 for partial summary judgment dismissing all claims of personal injury on the grounds that the Plaintiff would be unable to establish a causal relationship between the conditions of moisture and mold, and the specific injuries which she has allegedly sustained from those conditions is decided as follows. The Defendants base their position on the fact that the same physician who has treated the Plaintiff testified at a *Frye* Hearing in an unrelated matter, and at the conclusion of the hearing, the trial judge concluded, as a matter of law, that the scientific community did not recognize a causal relationship between mold and damp indoor and the health problems alleged by the Plaintiff.

BACKGROUND

Ms. Sweeney is a proprietary lessee and shareholder of Great Neck Terrace Corp., the owner of a residential co-operative complex at 29 West Mill Drive, Great Neck, New York. She resides in Apartment 11A. Century Operating Corp. is the manager of the

complex. Her Amended Verified Complaint alleges numerous deficiencies as a result of the gross negligence, misfeasance, and malfeasance of the Defendants. Among those conditions are an accumulation of water in the ceilings and walls throughout the apartment, producing severe mold and mildew.

She alleges in her Verified Bill of Particulars that her injuries included " . . . insomnia, mental distress, damage to respiratory system, damage to sinuses, damage to immune system, damage to skin, ears and other areas and systems". In *Fraser v. 301-52 Townhouse Corp.*, 13 Misc.3rd 1217(A), 831 N.Y.S.2d 347 (N.Y. Sup. 2006, Kornreich, J.) the Court conducted a 10-day *Frye* Hearing to determine "whether the plaintiffs' theory of the case - 'that mold in their apartment caused them respiratory problems' - is generally accepted in the relevant scientific community and whether the methodology used by plaintiffs to measure the mold, was within generally accepted scientific methods".

The movants ask the Court to dismiss those portions of the complaint which allege personal injuries as a result of the conditions of moisture and mold. The issue is whether or not the determination of the Court in *Fraser* precludes this Court from reaching a different result in this matter.

DISCUSSION

Since Ms. Sweeney was not a party to *Fraser*, there can be no application of the doctrines of res judicata, collateral estoppel, stare decisis, or law of the case. Collateral estoppel and its corollary, res judicata, are designed to preclude a party who has had a full and fair opportunity to contest a decision in an earlier action, from re-litigating the same issue in a subsequent proceeding. While justice requires that an action be once fairly tried, public tranquility demands that once tried, all litigation of that question, between the same parties or those in privity with them, should be forever closed. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). (Internal citations omitted). Collateral estoppel precludes a party from relitigating an issue previously raised and decided against that party, whether or not the tribunals or causes of action are the same. *Id.*

The fact that the Plaintiff in *Fraser* was unable to convince the trial court that the method of gathering samples of mold growth was scientifically acceptable, that her expert witness did not overcome the testimony of the witnesses produced by the Defendants, and that the scientific literature considered by the Court did not substantiate the Plaintiff's position that the medical community generally accepts the relationship between mold and dampness and the physical ailments complained of, does not preclude Sweeney from attempting to do so. She was not a party, and had no opportunity

for a full hearing of the matter. The method of gathering samples, and the claimed physical conditions and illnesses here would have to be identical. Additionally, there may be some scientific study since *Fraser* which could well cause a Court to reach a different result after a *Frye* hearing. The motion for partial summary judgment based upon the fact that the expert who is expected to testify for Sweeney is the same person who testified for Fraser is denied.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *Quinn v. Krumland,* 179 A.D.2d 448, 449 – 450 (1st Dept. 1992); See also, *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, (1974).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v. Garlock,* 23 A.D.2d 94 (3d Dept. 1965); *Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 (3d Dept. 1965).

The evidence will be considered in a light most favorable to the opposing party. *Weill v. Garfield,* 21 A.D.2d 156 (3d Dept. 1964). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *Tortorello v. Carlin,* 260 A.D.2d 201, 206 (1st Dept. 2003). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

The Defendants have submitted two substantial medical reports, each of which concludes that there is no body of scientific thought, or medical literature, which substantiates a correlation between indoor mold exposure to the physical ailments which the Plaintiff alleges. While critical of the Defendants' failure to include a copy of the report of her expert physician, Dr. Johanning in their motion papers, the Plaintiff, astoundingly, does not do so either. The Court has no basis upon which to conclude that there is a factual issue with respect to the relationship between the conditions complained of and the reported ailments sustained by the Plaintiff. The Verified Bill of Particulars contains technical reports of Heimer Engineering, P.C., and Olmstead Environmental Services, Inc., but there is no medical report relating the

conditions to the claimed injuries.

The Plaintiff has not met the burden of establishing the existence of a substantial question of fact and the motion to dismiss all claims of personal injury in the Complaint is granted.

This constitutes the Decision and Order of the Court.

Dated: JUN 12 2008

Kenneth A. Davis, J.S.C.