

**Alvarenga-Duran v New Whitehall Apts. LLC**

2008 NY Slip Op 31928(U)

June 20, 2008

Supreme Court, New York County

Docket Number: 0108937/2004

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**

PART 55

Index Number : 108937/2004

**ALVARENGA-DURAN, MARIA**

VS.

**NEW WHITEHALL APARTMENTS LLC**

SEQUENCE NUMBER : # 001

PRECLUDE

Justice

INDEX NO. 108937-04

MOTION DATE 3/13/08

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-5	
6-8	

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 *is* decided in accordance with the annexed memorandum decision and order.

FOR THE FOLLOWING REASON(S):

**FILED**

JUN 23 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 6/20/08

*[Signature]*

**JANE S. SOLOMON** 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: IAS PART 55

-----X  
MARIA ALVARENGA-DURAN,

DECISION AND ORDER

Plaintiff,

-against-

Index No. 108937/04

NEW WHITEHALL APARTMENTS LLC,

Defendant.

-----X

JANE S. SOLOMON, J.:

**FILED**  
JUN 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

This matter arose while plaintiff Maria Alavrenga-Duran (Duran) occupied apartment 210, at 250 West 100<sup>th</sup> Street, New York, New York (the Apartment), which was owned and/or managed by defendant New Whitehall Apartments LLC (NWA) from the time of Duran's initial occupancy in February 1993 through 2004.

The complaint alleges that as of 1998, NWA breached the lease agreement with Duran by failing to provide adequate ventilation or air-quality monitoring, and by failing to respond to complaints concerning toxic black mold (*Stachbotrys chartarum*) and the conditions of the air quality in the Apartment. The causes of action in the complaint are for negligence, and for breach of contract or the warranty of implied habitability.

NWA seeks an order: (i) precluding expert testimony at trial because Duran has yet to name a trial expert; (ii) pursuant to

CPLR 3212, granting it summary judgment dismissing the complaint on the ground that no triable issues of fact exist; and (iii) pursuant to CPLR 214-c, granting summary judgment dismissing the complaint on the ground that plaintiff's negligence claim was untimely commenced.

The applicable statute of limitations is generally a threshold issue in tort actions. See e.g. Sommer v Federal Signal Corp., 79 NY2d 540 (1992). The limitations period for exposure to toxic environmental agents is given by CPLR 214-c, which permits an action to be commenced within three years of the plaintiff discovering the injury, or from when the plaintiff should have discovered it by the exercise of reasonable diligence. The six-year limitations period for breach of contract or breach of the warranty of habitability is given by CPLR 213(2). See also Solow v Wellner, 86 NY2d 582 (1995).

In Duran's Examination Before Trial (EBT) of April 24, 2006, she stated that: (i) she started to feel sick from the conditions in 1998 (15:9-22); (ii) she made complaints about those conditions in 1998 (16:15-17:12); and (iii) she started researching *Stachbotrys* in 1998 (18:10-15; and 25:9-14). In addition, Duran sent a letter, dated March 19, 2004, complaining of five-year old hazardous conditions in the Apartment affecting her health. The document captioned Verified Bill of Particulars dated April 22, 2005 states, among other things;

"1. The occurrence took place in 1998 to present."

"8. (a) Plaintiff was confined to the hospital for approximately one (1) week immediately following the aforesaid occurrence.

(b) Plaintiff was confined to her bed for approximately 1 ½ years immediately following the aforesaid occurrence and intermittently thereafter to date.

(c) Plaintiff was confined to her home for approximately 1 ½ years immediately following the occurrence and intermittently thereafter to date."

Duran has attempted to correct the dates given in the EBT by submitting a errata sheet some 22 months after the EBT. This attempted correction is rejected as a matter of law. CPLR 3116(a) explicitly provides that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Courts have been reluctant to vary the time period for changes to a deposition even within two months of the 60-day period "without a strong showing of justification." Zamir v Hilton Hotels Corp., 304 AD2d 493 (1<sup>st</sup> Dept 2003); see also 46 Siegel's Practice Review 1, New Laws on Signing and Using Depositions, at 1 (July 1996).

The court also notes that Duran makes no attempt to explain why the answers in the EBT were incorrect. See Rodriguez v OD&P Constr., 194 Misc 2d 284 (Sup Ct, Bronx County 2002) (changes allowed where errata sheet, in compliance with CPLR 3116, was accompanied by a statement explaining reason for each change). Rather, Duran only attempts to explain the delay in correcting

the EBT. This is insufficient as a matter of law. See Marzan v Persaud, 29 AD3d 652 (2<sup>nd</sup> Dept 2006) (conclusory reason for correction insufficient to explain significant, substantive amendment to deposition testimony); Marine Trust Co. of Western New York v Collins, 19 AD2d 857 (4<sup>th</sup> Dept 1963) ("the omnibus statement of the witness that corrections were made to correct his errors in testifying ... is improper").

The court declines to use its powers under CPLR 2004 to extend the 60-day deadline to 22 months. Compare Binh v Bagland USA, 286 AD2d 613 (1<sup>st</sup> Dept 2001) (slight delay in furnishing the errata sheet allowed).

In view of the assertion that the exposure to mold occurred in 1998 and she discovered the injury that year as well, and the commencement of this action in 2004, her claim is time barred under CPLR 214-c. As a result, that portion of the complaint seeking recovery in negligence for exposure to toxic agents in the Apartment is dismissed. In that light, the request for an order precluding expert testimony might be moot, except that, while it is not so denominated, this part of the motion might be considered the request for a "less drastic sanction" than dismissal directed by the Appellate Division when it reinstated the complaint in its decision of May 8, 2007 (40 AD3d 287 [1<sup>st</sup> Dept 2007]), and, accordingly, should be addressed here. In context, however, NWA is raising the issue of preclusion not

based on failures prior to the appeal, but because, months later, no expert had yet been proffered.

NWA relies on more than the simple fact of failure to name an expert witness; it provides the affidavit of Stuart Young, M.D., who is Board Certified in Allergy, to challenge the merits of Duran's claimed injury. He states that Duran failed to appear for an examination, but that the medical records he reviewed do not "show any allergy to mold, any test for such allergy, or any other pre-disposition to allergy-type symptoms as a result of environmental triggers. . . . There are no skin tests or "RAST" test of any type (mold especially) . . . Persons who have mold allergy have highly positive skin or blood tests to mold." Significantly, he goes on to say, first, that "none" of her alleged symptoms, namely asthma, bronchitis, memory loss or syncope, "can be caused by indoor mold exposure", and second, that "there are no current updated scientific data, or updated medical trials, that support the claim that indoor residential mold causes the ailments identified by her. Any conclusion that indoor residential mold causes the ailments identified by Ms. Alvarenga-Duran is a conclusion that is not generally accepted in the medical community in general, and the allergy community in particular."

In response, Duran became obligated not only to name her trial expert and explain the delay, but also to come forward with

probative evidence controverting the opinions of Dr. Young. She provides an "Affirmation of Medical Treatment" from E. Neil Schachter, M.D., a Board Certified pulmonologist. He states that Duran's diagnosis is environmental asthma/bronchitis secondary to mold exposure and recurrent chronic sinusitis secondary to mold exposure, and that "with medical certainty" these conditions "were caused by her mold exposure experienced at her apartment." This submission is not responsive to Dr. Young's. It is a conclusion without a factual basis and, accordingly, inadequate to raise a triable issue on causation. Moreover, Dr. Schacter does not contest Dr. Young's assertion that none of plaintiff's alleged injuries are attributable to mold exposure under any theory generally accepted as reliable in the relevant medical communities. See, People v Wesley, 83 NY2d 417 (1993), and Marso v Noyak, 42 AD3d 377, 378-379 (1<sup>st</sup> Dept 2007) ("... it is plaintiff's burden to show that his or her expert's theory is generally accepted in the relevant community" [citations omitted]).

NWA fails, however, to address Duran's claim for breach of contract or breach of the warranty of habitability whatsoever. Those claims, subject to a six-year limitations period (CPLR 213[2]), are timely.

Summary judgment requires a demonstration of entitlement to judgment as a matter of law. CPLR 3212. As no such showing has


been made, and courts have maintained the viability of causes of action for breach of the warranty of habitability despite the dismissal of a concurrent negligence component as time-barred (Martin v 159 West 80 St. Corp., 3 AD3d 439, 440 [1<sup>st</sup> Dept 2004]), the motion for summary judgment dismissing the second cause of action is denied. Accordingly, it is hereby

**ORDERED** that the motion of defendant New Whitehall Apartments LLC is granted to the extent that the first cause of action is dismissed, and it is otherwise denied; and it is further

**ORDERED** that the balance of the action is transferred to the Civil Court pursuant to separate order.

Dated: June 20 , 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**FILED**  
JUN 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

At an Individual Assignment Part 55 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, in the County of New York, City and State of New York, on the 20 day of June 2008.

P R E S E N T:

Hon. JANE SOLOMON  
JUSTICE

ORDER OF TRANSFER-325(d)

Alvarenga - Duran, Marta

County Clerk's Index No. 108937/04

New Whitehall Apartments  
vs.  
LLC

Calendar No. 2006L-00769

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Calendar Number 2006L-00769 be, and it hereby is, stricken from the Calendar of this Court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall place this action upon the appropriate calendar of the said Civil Court for jury / ~~non-jury~~ causes, among the issues filed for the June Term, ~~19~~ 20 08, without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

E N T E R,

  
**JANE S. SOLOMON**