

**Baskerville v Christ Temple of the Apostolic Faith,
Inc.**

2010 NY Slip Op 30389(U)

March 1, 2010

Supreme Court, New York County

Docket Number: 100257/06

Judge: Eileen A. Rakower

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

PART 15

PRESENT: _____

Index Number : 100257/2006

BASKERVILLE, ALLEN

vs

CHRIST TEMPLE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 100257/06

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/1/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ALLEN BASKERVILLE,

Plaintiff,

- against -

Index No.
100257/06
Decision and
Order

CHRIST TEMPLE OF THE APOSTOLIC FAITH, INC.,

Defendants.
-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he was exposed to toxic mold spores while living at the premises located at 12 West 129th Street Apartment 12 in the County and State of New York from February 1, 2003, until he was evicted in March 2005. Defendant Christ Temple of the Apostolic Faith, Inc. ("Temple"), the owner of the premises, moves for summary judgment pursuant to CPLR 3212 and pursuant to CPLR 3126, to preclude plaintiff from offering any evidence regarding mold testing. Plaintiff opposes. The parties appeared for oral argument in front of the Honorable Eileen A. Rakower on February 24, 2010.

The subject premises is described by Valerie Ross, Church Administrator, as a "large white house . . . approximately 6,000 square feet, three floors above ground and . . . a basement." Each tenant was assigned his or her own bedroom and there were "community bathrooms on each floor in the hallway" (with the exception of a few apartments which had private bathrooms). Ms. Ross approximates that there are about fourteen bedrooms in the house. On the first floor there is a kitchen and dining area. In or around 1997 or 1998, Bishop Bonner, the Senior Pastor of Temple, instituted a program to offer housing to elderly church members. Eventually, Temple sought to disband this arrangement, and instituted proceedings to evict tenants. Plaintiff, a 71 year old man, was one of the tenants who contested eviction.

Plaintiff alleges that he developed asthma, rhinitis, sinusitis and shortness of breath as a result of being exposed to the mold spores while living at the premises. Plaintiff alleges that he had never suffered from asthma before he moved into the subject building, and that he had no family history of the disease. Plaintiff points to

a mold condition, which may have been caused by repeated flooding of one of the upstairs toilets, and claims that he observed “mold and fungus, which was black and green in various parts of the premises,” including the bathrooms and the basement area. Plaintiff claims that “there was a terrible odor in the building.” The basement area was a “common area where [the] tenants would go to watch television.” Plaintiff testifies at his deposition that the tenants also ate in the basement because defendant had removed all the furniture from the dining area upstairs.

Temple, in support of its motion, submits: the pleadings; the note of issue; a preliminary conference order; plaintiff’s bill of particulars; the deposition transcript of Valerie Ross, Church Administrator; the deposition transcript of plaintiff; a “Notice of Termination of Tenancy Holdover;” a copy of a “311 complaint,” received April 27, 2004; a “Complaint Status” form; a “Route Information” form, dated May 12, 2004; two emergency room medical reports from Montifiore Medical Center, dated March 2, 2003 and May 16, 2003, respectively; the report of Jack Adler, M.D., Temple’s medical expert; a Notice for Discovery and Inspection (“D&I”), dated June 3, 2009; and a response to the D&I, dated June 19, 2009.

Plaintiff, in opposition, submits the following, not duplicative of Temple’s submissions: the affidavit of plaintiff; a document titled “Report: Evaluation of Fungi Baskerville Group Residence 12 West 129th Street New York, New York Leadcare, Inc. Project ID 25012; the deposition transcript of plaintiff; several informational printouts about mold; a letter from Robert Fried, MD, dated December 17, 2009; and a letter from Enviroinspect, dated February 23, 2005.

Initially, Temple served plaintiff with a Notice for Discovery and Inspection (“D&I”) on or about June 3, 2009. In the D&I, Temple requested that plaintiff produce “any and all inspection records, reports, writings for the subject premises concerning mold, fungi, leaks and/or water penetration for the period 2001 through 2005.” Plaintiff’s response to Temple’s request for reports, dated June 19, 2009, states, in relevant part:

As counsel well knows, the materials requested in this paragraph are items that would be in the control of the defendant and for the defendant to provide to the plaintiff. None of the requested materials are such as would be in the plaintiff’s possession and control.

Plaintiff filed a note of issue on July 6, 2009. Temple claims that, at a

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conference held in front of the Honorable Justice Tolub on October 16, 2009, plaintiff informed Temple that a mold evaluation had indeed been conducted, and that a report existed. Temple filed the instant motion on October 21, 2009. Temple asserts that plaintiff did not provide the report until November 23, 2009.

Plaintiff's counsel argues that he did not have access to the report because he is successor counsel and that the report was "buried in a large file maintained by prior counsel . . . [and] affirmant was not aware that a testing report existed." Plaintiff's counsel acknowledges that he became "aware of this report in or about September, 2009."

An order of preclusion may be issued when a party wilfully fails to disclose information which the court finds ought to have been disclosed. (*see* CPLR §3126[2]). An inference of an intentional withholding can naturally be made where, as here, plaintiff failed to produce the Leadcare report until after he filed his note of issue, and then "disclosed the report only in opposing the motion for summary judgment." (*see Cela v. Goodyear Tire & Rubber Co.*, 286 AD2d 640[1st Dept. 2001]). Despite finding that the withholding was intentional, the court in *Cela* found that a conditional order of preclusion should be issued "in view of [the] . . . failure to demonstrate any actual prejudice." (*Id.* at 640).

Here, unlike in *Cela*, Temple has been prejudiced as a result of plaintiff's failure to timely produce the Leadcare report. Even if law office failure had prevented plaintiff from producing the report when Temple first requested it, plaintiff freely acknowledges that he was aware of the report in September 2009, yet, he failed to produce it until after Temple made its motion. Due to plaintiff's failure to produce the Leadcare report, Temple was deprived of the opportunity to examine and refute a key piece of material evidence in preparation of its motion for summary judgment.

Even if the Court were to consider the Leadcare report, the Court would still be compelled to grant the motion. Temple has established its entitlement to summary judgment, and plaintiff, when asked to lay bare his proof, has failed to raise an issue of fact by proof in admissible form with regard to causation.

Temple submits the affidavit of Jack J. Adler, M.D., F.A.C.P., of AHB Pulmonary Associates, P.C., who examined plaintiff on May 12, 2009. Dr. Adler's report is based upon the assessment of the results of an in office physical, and on past pulmonary testing results, as compared with the pulmonary tests conducted at his

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office. Dr. Adler incorporates plaintiff's medical records, as well as the bill of particulars and plaintiff's deposition transcript into his report. Dr. Adler acknowledges that plaintiff is suffering from asthma but also concludes that plaintiff suffers from various other ailments including "hypertension, atherosclerotic cardiovascular disease, status post myocardial infarction and elevated left hemidiaphragm¹, of unknown cause." Dr. Adler opines:

The evidence that [plaintiff's] asthma is related to mold exposure is purely anecdotal. First of all we know very little about what molds were present, if any, in the house other than the allegation stated in the Bill of Particulars. There is no objective evidence as to the mold status of the facility under question. Secondly, we have no evidence that Mr. Baskerville has any type of reaction to mold. Thus there has been no evidence provided linking any alleged exposure to Mr. Baskerville's biomedical status. In summary, I find no convincing evidence that any alleged mold exposure caused his current symptoms and status. In view of his multiple Emergency Room visits, I believe that his deterioration represents a failure to adequately manage his respiratory status . .

Indeed, Dr. Adler had a Montefiore Medical Center record dated March 2, 2003, wherein it is noted

64 y/o aa male who has no pmh presents to ER with complaints of SOB and wheezing. Pt states being in normal state of health until 4 wks ago when ran out of subway after "stink bomb" was dropped. Pt states that the next day he began to have a mild dry cough. This persisted until 2 wks ago when pt began to experience SOB with brisk walking and going up flights of stairs.

Where the proponent of a motion for summary judgment makes a prima facie showing of entitlement, 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. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich*

¹An elevation of the muscle that separates the chest cavity from the abdomen. Elevation of the hemidiaphragm can indicate anything from a chest wall injury to lung cancer. (Encyclo Online Encyclopedia: <http://www.encyclo.co.uk/define/elevated%20hemidiaphragm>).

[* 6] .
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, 251-252 [1st Dept. 1989]).

The Court finds that Temple has met its burden, and it is incumbent upon plaintiff to lay bare its proof that it can establish causation. Plaintiff need not show causation by a preponderance of the evidence for purposes of this motion, but must demonstrate that there exists an issue of fact by proof in admissible form.

In opposition, plaintiff submits only an unsworn conclusory letter from his treating physician which states:

Allen Baskerville has been my patient since 2003. He has reactive airway disease which followed his exposure to mold in the house he was living in. He has had numerous emergency room visits and hospitalizations likely due to this.

Toxic tort cases require 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. Mobile Oil Corp.*, 7 NY3d 434[2006]).

Plaintiff fails to submit evidence showing that he was exposed to sufficient levels of mold to cause his illness. Rather, plaintiff submits an unsworn letter from his treating physician, which merely states that plaintiff’s symptoms *followed* his mold exposure and that the exposure *likely* caused his hospitalizations. Given another opportunity at oral argument to lay bare his proof, plaintiff again failed to present any evidence in admissible form on the issue of causation.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the action is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

Dated: March 1, 2010


Eileen A. Rakower, J.S.C.

FILED
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