

<b>Figuroa v 242-246 Bradhurst Holding LLC</b>
2011 NY Slip Op 32845(U)
October 12, 2011
Supreme Court, New York County
Docket Number: 109869/08
Judge: Doris Ling-Cohan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Figueroa

INDEX NO.

109869/2008

MOTION DATE

- v -

242-246 Bradhurst Holding

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

PAPERS NUMBERED

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

1, 2

Answering Affidavits – Exhibits

3

Replying Affidavits

4

11/30/2010, 11/24/2011, 3/8/2011

5, 6, 7

Cross-Motion:  Yes  No

letters from Counsel dated 1/20/11, 2/10/11, 1/26/11, 3/1/11, 3/2/11, 9, 10, 11, 12, 13

Upon the foregoing papers, it is ordered that this motion

for summary judgment

by defendant is denied in accordance with the attached memorandum decision.

The parties shall proceed to mediation, and, if unable to settle, notify this Part to schedule for trial, by joint letter (with copy of this order).

**FILED**

OCT 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/12/11

**JUSTICE DORIS LING-COHAN**

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):

[\*2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
GENESIS FIGUEROA, an infant by her  
mother and natural guardian, YOJANNE  
DE LA CRUZ,

Plaintiff,

Index No.: 109869/08

-against-

DECISION

242-246 BRADHURST HOLDING LLC,

Motion Seq. No.: 002

Defendant.

-----x  
**DORIS LING-COHAN, J.:**

**BACKGROUND**

Defendant 242-246 Bradhurst Holding LLC (Bradhurst) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint or, in the alternative, precluding the expert opinion of Dr. John Rosen (Rosen) or, in the alternative, dismissing all claims for economic loss.

Plaintiff Genesis Figueroa (Genesis) was born on October 28, 2001, and from the time of her birth until the end of 2008, she lived in apartment 25 located at 242 Bradhurst Avenue, New York, New York, premises owned by Bradhurst. The apartment was leased to Juan Castillo (Castillo), the only named tenant on the lease. Motion Ex. I.

Bradhurst's management company, Barberry Rose Management, provided Castillo with a Lead Paint Rider inquiring as to the presence of children in the apartment and the existence of any

chipping paint conditions. Motion Ex. J. The rider returned by Castillo indicates that there were no children under 10 years of age in the apartment, and that there was no peeling paint. According to the examination before trial (EBT) of Geronimo Figueroa (Figueroa), Genesis' father, it was Figueroa, not Castillo, who actually filled out the rider. Figueroa EBT, at 30-37.

The medical records for Genesis reflect blood tests showing a blood lead level of 5 micrograms ( $\mu$ /dl) on June 24, 2003. On February 9, 2005, a blood test returned a blood lead level of 12  $\mu$ /dl, and a follow-up test administered nine weeks later returned a blood lead level of 6  $\mu$ /dl. On July 14, 2005, Genesis' blood lead level was 3  $\mu$ /dl. None of the parties dispute these results.

In paragraph 5 of the Verified Bill of Particulars (Motion Ex. C), Genesis alleges that she suffers from the following medical conditions:

"Plumbism, lead poisoning and its sequelae; Anemia; Elevated blood levels; Increased lead burden in blood and infant's body, causing developmental delays and brain damage; Cognitive deficits and learning difficulties; Loss of I.Q.; Behavioral irregularities; Anti-social behavior patterns; Developmental delays resulting in inability to fully interact and play with others; Difficulties in concentration, unfocused and shortened attention span, attention deficits; Necessity for extensive medical monitoring; Learning difficulties and impairment in ability to carry out responsibilities; Inability to participate in usual childhood activities; Language deficits and delay; Necessity for multiple painful blood tests; Physical and mental pain, suffering and anguish; Embarrassment and humiliation; Increased lead in bony formations; Elevated bone lead level; Sleep

disorders; Visual Disturbances; Hyperactivity; Lack of concentration; Memory loss; Infant plaintiff has also suffered subclinical joint and connective tissue disease, disease of immune system, kidney disease, hypertension and visual and auditory system processing deficits."

Dr. Theodore Lidsky (Lidsky), a neuropsychologist, examined Genesis on March 17, 2009, at the request of plaintiff's counsel. Motion Ex. D. In his report, Lidsky noted that while her intellectual testing was in the "Average range, [n]europsychological testing identified ... functioning ...significantly below expectations [as to] naming, auditory working memory and verbal memory". *Id.* at 4. Lidsky's opinion is based on the following tests that he administered: Wide Range Intelligence Test (WRIT); the Purdue Pegboard Test; the Rey Osterrieth Complex Figure Test; the Connors Continuous Performance Test, and some parts of the NEPSY-II and WISC III tests.

Lidsky also tested Genesis for attention deficit disorder, and found that

"Genesis' overall pattern of performance was neither unequivocally similar nor dissimilar to that of a child with ADHD (Confidence Index 50.1%). Examination of individual indices also did not clearly indicate abnormality."

*Id.* at 3.

Lidsky stated that while he could not conclude to a reasonable degree of certainty that Genesis has suffered a brain injury, he concluded that, to determine whether Genesis has been injured by her exposure to lead-based paint, because of a "lag

effect", Genesis "should be re-tested in two years or before that if her school performance and conduct deteriorates." *Id.* at 5. According to Lidsky, in describing a "lag effect", he indicates that:

"[t]his phenomenon [is] recognized by the U.S. Centers for Disease Control and Prevention (CDC) [and] The CDC states that lead poisoning induced neurocognitive impairments emerge only after several years have elapsed following the injury... '[t]he lag may be the result of a toxicological process in which some period of time is required for past lead exposure to affect the central nervous system function. Another explanation is that lead may primarily affect higher-order neurodevelopmental processes that are best tested at later ages when children's response modalities are more highly differentiated'.

*Id.* at 4-5 (citations omitted).

Genesis was examined by a second neuropsychologist, Jose Arcaya, Ph.D. (Arcaya) on July 18 and 21, 2009. Motion Ex. E. According to Arcaya, Genesis' verbal reasoning abilities fell in the Low Average range, which he opined could be the result of either brain impairment or the product of cultural and home limitations, which do not provide Genesis with age-appropriate English skills. Arcaya further indicated that when he tested Genesis' visual organization skills using the Leiter-R test ("a culturally fair test"), she "showed herself to be clearly limited in her ability to manipulate visual forms in her mind, place forms in logical sequence or progression, and rotate geometric shapes in her imagination". *Id.* at 3. According to Arcaya, "while weakness in the...Leiter-R is not conclusive proof of neurological damage, that possibility becomes more persuasive

when considered in light of the similar results obtained [by Lidsky] using the WISC-IV...". *Id.* Arcaya concluded his report by stating the following:

"When considered in terms of the kinds of specific behavioral complaints indicated by her mother on the Children's Problem Checklist as well as the Leiter-R Parent rating Scale [both surveys measure the kinds of problematic conduct exhibited by maladjusted children], Genesis demonstrates behavior that conforms to the typical ADD child; requiring immediate attention, prone to impulsive action, restless, careless in action, difficulty following rules, and poor self-image. Examination of her background records indicate that earlier this year Genesis had been psychologically tested largely using verbal measures (administered by Theodore I. Lidskey [sic], Ph.D.). On that occasion she obtained an outcome falling in the Average range of intelligence, but no concerted work was done establishing non-verbal degree of aptitude. While I would agree that Genesis has at least average intelligence using linguistic measures, *her visual understanding is much less than that professed by Dr. Lipsky [sic]. Given Genesis' behavioral difficulties and reported impulsiveness, her visual processing issues (established by the Leiter-R) implies strongly the presence of neuropsychological damage, the origins of which are beyond the scope of this evaluation.*"

*Id.* at 4 (emphasis supplied).

Arcaya further supplied an affirmation in opposition to the within motion for summary judgment in which he indicates that, "[a]verage and/or above average functioning in most domains, combined with significantly poorer performance in other, closely related, domains - such as that evidenced by Genesis - is often an indicator of brain injury". Affirmation in Opposition, Arcaya Affirmation, ¶10. According to Arcaya:

Although both Dr. Lidsky and I found Genesis to be of at least average intelligence, and that she has some indications of an attention deficit disorder, my

results indicated that the infant's visual understanding was much lower than his...[h]owever such discrepancy is not rare...

Affirmation in Opposition, Arcaya Affirmation, ¶15.

Significantly, Acaya explained the "time lag" phenomenon, common to children of Genesis' age and the danger of testing at such an early age, as follows:

*It is likely that both sets of assessments have actually underestimated any brain damage suffered by...Genesis. The accuracy of neurofunctional assessments tend to increase as a subject grows into adulthood. Although the assessment of a young child may uncover brain damage, it is less likely to reveal the full scope of damage to particular functions[.] The [F]ederal Centers for Disease Control recognizes such a "time lag" for the emergence of the cognitive symptoms of lead poisoning. As such, they caution against testing at too early an age due to the risk of 'false negative results...' and advocate 'long-term surveillance of behavior and neurodevelopment'...Genesis is at an age at which the brain is rapidly developing, but she is barely above the point at which symptoms of low level lead poisoning usually begin to become apparent. In addition, these symptoms can continue to reveal themselves as the subject advances into adulthood...Thus, brain injury sustained early in development often results in a slowly emerging continuum of deficits. 'This process is sometimes referred to as "growing into a deficit". Problems may appear...even years after the initial injury, as greater academic and social demands are placed on the child's already compromised learning abilities, or when abilities dependent on damaged brain regions fail to develop...'...behavioral impairments due to damage...only become fully evident as a child grows older and the demands for higher level functioning increase with age...Thus, it is recognized that it is highly likely that the full scope of the child's problem and the severity of neuropsychological impairments will be significantly underestimated the younger the child is, and that additional evaluations are recommended as the child grows older*

Affirmation in Opposition, Arcaya Affirmation, ¶15-17 (citations

omitted, emphasis supplied).

Dr. John Rosen (Rosen), a pediatrician, provides an initial report on his opinion of Genesis' condition, dated July 1, 2009. Motion Ex. F. In his report, Rosen states that Genesis was initially diagnosed as having the disease of childhood lead poisoning when she was approximately three and a quarter years old, and he assessed Genesis' cognitive functions as follows:

"Genesis's Full Scale IQ was 104 (61<sup>st</sup> percentile), her Verbal IQ was 104 (61<sup>st</sup> percentile) and her Visual Score was 103 (58<sup>th</sup> percentile). She was found to have cognitive impairments in naming, auditory working memory, and verbal memory.

It was unclear from this evaluation whether these [difficulties] reflect brain damage from lead [poisoning] or her limited abilities to understand English commands. Further neuropsychological testing is indicated in the future."

*Id.* at 2.

Rosen concluded in recommending that Genesis receive periodic neurobehavioral-cognitive testing every three to five years, that she attend a private school and receive daily tutoring with homework and have counseling with a psychologist or psychiatrist three to four times per week. Further, should Genesis fracture a weight-bearing bone, a BPb should be obtained at the time of casting and repeated weekly until she is fully ambulatory, and, should she decide to have children, her bone lead content should be measured. *Id.* Rosen also states that Genesis' disease was caused by ingestion of lead-based paint at her home, however, recommended further neuropsychological testing, since it was "unclear...whether [Genesis'] deficits

reflect brain damage from lead or...limited abilities to understand English commands".

Thus, thereafter, Arcaya conducted a bilingual Neuropsychological Assessment of Genesis. Based upon such bilingual Neuropsychological Assessment by Arcaya, Rosen issued an addendum to his July 1, 2009 report dated July 25, 2009, which indicates, *inter alia*, as follows:

"Based, in part, on my extensive clinical experience, and, based, in part, on review of pertinent literature, Genesis' [sic] *cognitive deficits were caused by her excessive exposure to and ingestion of leaded paint; and these impairments are considered to be permanent and irreversible.* This conclusion is based upon carrying out a pediatric differential diagnosis; and in so doing, her exposure to and ingestion of lead (as leaded paint) contributed substantially and causally to her cognitive impairments".

*Id.* Addendum (emphasis supplied).

Further, in his affidavit supplied in opposition to the within motion, Rosen states that based upon "[t]he neurological findings, in the aggregate, as a collection, as a constellation, were consistent with typical outcomes of her excessive exposure to and elevation of lead in blood". Affirmation in Opposition, Rosen Affirmation, ¶30. Rosen further opines, *inter alia*, that:

"with a reasonable degree of medical and toxicological certainty, that Genesis...was excessively exposed to lead from at least two years of age into 2005, including a period of from 1 to 6 months during which she had the disease of lead poisoning...[and] that the infant plaintiff's exposures to and ingestion of lead paint...substantially contributed to the brain injuries and neuropsychological impairments identified by and described by Drs. Lidsky and Arcaya".

Affirmation in Opposition, Rosen Affirmation, ¶34-35.

At the request of defendant, Genesis was also examined by Dr. Barry Kosofsky (Kosofsky), a pediatric neurologist at New York-Cornell Medical Center, on September 9, 2009. In his report, Kosofsky states that Genesis' developmental milestones have been entirely within normal limits, that her family history does not indicate any attention deficit disorders, that her cognitive testing showed her to be alert, appropriate and interactive during the evaluation, and that she has normal physical, neurologic and cognitive functions. Motion, Ex. K. Kosofsky also states that Genesis' only elevated blood level occurred on February 11, 2005, which came down in the following two months. Kosofsky opines that the elevation could have been due to dehydration or a suboptimal sample, and may have been falsely elevated. *Id.* However, Kosofsky goes on to state that, even if the elevated blood lead level was accurate, such a minimal elevation for such a short period has "no discernable implications for subsequent neurologic, behavioral, or cognitive development [and] there is, therefore, no objective concerns regarding any neuro-behavioral deficits". *Id.*

Kosofsky has also provided an affirmation in support of Bradhurst's motion. Motion Ex. L. In his affirmation, Kosofsky states, that he disagrees with the evaluations of Lidsky, Arcaya and Rosen, and does not believe that Genesis needs any special schooling, home care, home tutoring, medication or therapy.

Bradhurst also retained neuropsychologist Dr. David Masur

(Masur) to review the reports and data of Lidsky and Arcaya.

Motion, Exh. M. In his affidavit, Masur states that:

"The test results, combined with the blood lead history of Genesis Figueroa lead me to conclude, within a reasonable degree of neuropsychological certainty, that Genesis Figueroa has not sustained any neurocognitive damages as a result of lead in her blood. Finally, I have read the report supplied by plaintiffs regarding proposed economic loss of Genesis. Based on my findings as reported above, I find no basis to conclude that Genesis will suffer any degree of economic loss or failure to complete her desired level of education."

*Id.*

In her affirmation supplied in opposition to the within motion, Yojanne de la Cruz (Cruz), Genesis' mother, indicates that Genesis is hyperactive and has trouble focusing on tasks. Affirmation in Opposition, Guardian Affidavit, ¶ 14. At her EBT, Cruz testified that Genesis, throughout her school years (at the time of the deposition Genesis was in the midst of second grade), she has had complaints from Genesis' teachers that Genesis is easily distracted and has difficulty in reading and math. Cruz EBT, at 103, lines 22-25; at 104, line 24; at 105, line 4; at 108, lines 20-25; at 111 lines 3-6; at 113, line 19; at 114, line 11; at 117, line 24; at 118, lines 6, 24; at 119, line 20; at 121, lines 5-20; at 124, lines 8-12.

As part of a CPLR 3101 (d) notice with respect to economic experts, plaintiffs provided a notice stating that one of two named experts will testify that Genesis has suffered an impairment of her future earnings ability due to cognitive and

behavioral disturbances, that she will only be able to perform at entry level or minimum wage jobs, and that her future medical expenses will total approximately \$1,750,000.00. Motion, Ex. N.

Lastly, Bradhurst has attached Genesis' school records, which indicate that, at the end of first grade, Genesis performed at or above grade level in all categories. Motion Ex. O. Genesis' second grade report card for the first half of the year has also been provided, which shows below grade-level performance, which includes a note from Genesis' teacher stating that "Genesis has the capacity to improve her reading, writing and math level with a little bit of help at home." *Id.*

Plaintiffs have asserted two causes of action against Bradhurst: (1) negligence in failing to abate and eliminate or properly warn plaintiffs about lead-based paint hazards in the subject premises; and (2) violations of Title X for failing to disclose the presence of known lead-based paint and/or lead-based paint hazards at the subject premises.

#### **DISCUSSION**

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible

form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978). The motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dept 1992), citing *Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

Genesis initially challenges the sufficiency of Bradhurst's motion, alleging that the motion fails to meet the requirements of CPLR 3212 in that it does not include an affidavit of an individual with personal knowledge of the facts. Instead, Bradhurst provides an attorney's affirmation, used to introduce the reports of Genesis' experts Lidsky, Arcaya and Rosen, the EBT of Cruz, one of the plaintiffs in this action, the sworn affirmation of Kosofsky, who examined Genesis, and an affidavit of Masur. The fact that this evidence was submitted by an attorney's affirmation rather than by the affidavit of an individual with personal knowledge is not fatal to the motion and thus, Bradhurst's motion will be considered on its merits. See *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Olan v Farrell Lines Inc.*, 64 NY2d 1092 (1985); *Spierer v Bloomingdale's*, 43 AD3d 664 (1<sup>st</sup> Dept 2007) (admission of plaintiff's expert reports

in defendant's motion that were only introduced by an attorney's affirmation).

Nevertheless, applying the above well settled principles with respect to motions for summary judgment, as detailed below, Bradhurst's motion for summary judgment dismissing the complaint is denied.

While Bradhurst argues in support of summary judgment, that Genesis has not sustained any injury causally related to the alleged exposure to lead-based paint, upon the within submissions, there is in essence, a "battle" of the experts, with respect to such, and thus, factual issues, as to Genesis' condition and as to whether such condition relates to an exposure to lead paint. While defendant's experts assert that Genesis is "normal" and suffers no abnormalities, plaintiff's experts maintain that Genesis displays abnormalities, consistent with lead poisoning.

Specifically, Lidsky, found an "abnormal pattern of neuropsychological test results and indicated that she would need to be retested because of a "lag time" effect which occurs in lead-based paint poisoning. According to Arcaya, as indicated above, the Federal Centers for Disease Control, recognizes such a "lag time" for the emergence of the cognitive symptoms of lead poisoning (which may continue to emerge throughout childhood and into adulthood). Affirmation in Opposition, Arcaya Affirmation, ¶16. Rosen, in his affidavit, indicates that Genesis suffers

from lead-based paint poisoning, and recommends extensive treatments. Arcaya concluded that there was a strong implication of neuropsychological damage based on difficulties he found when he administered a culturally fair test. Motion, Exh. E.

In contrast to plaintiffs' expert opinions, defendants experts Kosfsky and Masur opined that Genesis did not suffer from any injuries resulting from exposure to lead-based paint. Significantly, it is noted that, none of defendants' experts dispute that the "lag time" effect occurs in lead-based paint poisoning (or even make mention of such effect); nor do they conclude and conclusively state that Genesis, who is only 9 years of age, does not and will not suffer from the "lag time" effect of her exposure to lead-based paint. The court notes that, should this court grant summary judgment of dismissal to Bradhurst at this juncture, Genesis would be barred from recovery of her already documented symptoms and any others which may manifest, as she ages.

As a general proposition, conflicting affidavits presented to a court in resolving a motion for summary judgment present a question of fact for the jury to resolve. *Munoz v Poretz*, 301 AD2d 382 (1<sup>st</sup> Dept 2003). "The conflicting affidavits by the respective experts raise questions of fact as to credibility and the weight to be afforded to their respective opinions... ." *Cruz v Hungjoo*, 237 AD2d 159, 159-160 (1<sup>st</sup> Dept 1997). The obvious conflict between findings and opinions of [experts]

creates issues of fact which are properly resolved by a jury". *Manrique v. Warshaw Woolen Assoc., Inc.*, 297 AD2d 519, 521 (1<sup>st</sup> Dept 2002). As indicated above, while plaintiffs' doctors discuss the "lag time effect" in lead-based poisoning, defendants' doctors do not dispute that such often occurs and do not conclusively indicate that Genesis does not suffer from this and will not develop more symptoms, as she ages.

Therefore, based on the foregoing, Bradhurst's motion seeking to dismiss the complaint is denied. The court notes that while defendant also seeks to dismiss plaintiffs' claim for economic loss, upon the within submissions, the amount of damages to which Genesis may or may not be entitled, including economic loss, is a question of fact that cannot be determined on this motion for summary judgment. See *Cassata v. New York New England Exchange*, 250 AD2d 491 (1<sup>st</sup> Dept 1988).

The court denies Bradhurst's request to preclude the opinion of Dr. Rosen. Defendant's motion seeks the exclusion of Rosen's opinion on *Frye* grounds. As stated by the court in *Frye v. United States*, 293 F. 1013, "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 54 App.D.C. 46, 47. The Court in *Nonnon v City of New York*, 32 AD3d 91, 103 (1<sup>st</sup> Dept 2006), stated that

*Frye* concerns are implicated, only when the methodologies or deductions of experts are premised on "novel science" and not on "principles that are sufficiently established to have gained general acceptance as reliable." See *Marsh v Smyth*, 12 AD3d 307, 308 (1<sup>st</sup> Dept 2004). This principle was further clarified in *Marso v Novak*, 42 AD3d 377, 387- 79 (1<sup>st</sup> Dept 2007), where the Court found that it was "the plaintiff's burden to show that his or her expert's theory is generally accepted in the relevant community."

Here, plaintiffs' experts, including Rosen, cite to numerous authorities and scientific articles about childhood lead poisoning and its injuries and effects that support the opinions and findings relied upon by plaintiffs. Defendant argues that "[i]t is the misuse of a differential diagnosis that should either render Dr. Rosen's opinions meaningless and precluded or subject him to a *Frye* hearing " because " [h]e based his entire 'differential diagnosis' on a false premise, the notion that both Dr. Lidsky and Dr. Arcaya found permanent brain damage in [the plaintiff]." Reply Affirmation at ¶ 41. Here, defendant appears to merely question Rosen's assumptions or the facts upon which he based his opinion, and such is more properly a subject of cross examination. *Frye* is not implicated here because the methodology known as differential diagnosis, as well as the conclusion Rosen reaches, and the theory which he employs to reach those conclusions, are generally accepted within the medical community.

As noted by the Court of Appeals in *People v. Wesley*, 83 NY2d 417, 422 (1994):

While foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted, the test pursuant to *Frye v. United States* (293 F. 1013) poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.

#### CONCLUSION

Based on the foregoing, it is  
ORDERED that defendant's motion is denied; and it is further  
ORDERED that within 30 days of entry of this order,  
plaintiff shall serve a copy upon defendant, with notice of  
entry.

Dated: 10/12/11

**FILED**

Doris Ling-Cohan, J.S.C.  
OCT 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

J:\Summary Judgment\Figueroa.242 246\denys summary judgment.wpd