

Gallagher v Ruradan Corp.

2013 NY Slip Op 31058(U)

May 10, 2013

Supreme Court, New York County

Docket Number: 102656/09

Judge: Louis B. York

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SCANNED ON 5/15/2013
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Kallaghan et al.

-v-

Rivadan Corporation

INDEX NO. 102656/09
MOTION DATE 3/27/13
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying decision.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room **141B**).

Dated: 5/10/13

Leay, J.S.C.

LOUIS B. YORK
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT 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: IAS PART 2

-----X
ROBIN GALLAGHER and TWAD SCHUETRUM,

Index No. 102656/09

Plaintiff,

-against-

RURADAN CORPORATION,

Defendant .

-----X

LOUIS B. YORK, J.:

Defendant moves for summary judgment to dismiss this action for damages based on exposure to mold.

Background

Both Robin Gallagher, her boyfriend Twad Schuetrum, the plaintiffs, moved into their current apartment about 20 years ago. Robin complains of a variety of symptoms including depression, anxiety, fibromyalgia, Lyme's disease and multiple sclerosis, just about all of which antedated the plaintiffs' occupancy of the apartment. Twad's symptoms are much less severe.

Both of them withheld rent in the past because of mold infestation. Several summary proceedings have resulted in either settlements or decisions in favor of the defendant without any reductions in the rent. On many occasions, the defendant attempted to gain entry to the apartment to clear up the mold conditions, but was rebuffed by the plaintiffs. It finally was able to enter *via* a court order, and discovered that the walls and ceiling of the bathroom were covered in bubble wrap, a known source of the collection of moisture, leading to mold

infestation.

In the 20 years that plaintiffs have lived in the apartment, they have not sought other living quarters as a result of the mold. When they moved in, Robin was already receiving Social Security disability payments for depression, chronic pain and suspected Lyme disease. Moreover, after the mold was removed from the apartment, neither of the plaintiffs exhibited a reduction in symptoms. Interestingly, no other apartment occupants complained of mold.

Dr. Boxer, a board certified immunology and allergy specialist reported that there was no known causal relationship between mold and the plaintiffs' symptoms.

Dr. Adler, a board certified pulmonologist could not find any link between Twad's symptoms and the mold.

Dr. Michelle Alpert, Robin's treating doctor, an osteopath and family medicine practitioner and a board certified internist, testified extensively about Robin's illness. She found Robin hypersensitive to mold which caused many of the adverse symptoms suffered by plaintiff as a result of her exposure to mold. Although she stated that her *curriculum vitae* was attached to her report, it was nevertheless missing. As a result, she has not presented any evidence of her qualifications in this area.

Dr. Evelyn Tolston, Twad's treating doctor, asserted that Twad's relatively mild symptoms resulted from his exposure to mold. Her *curriculum vitae* was also not attached to her report, with the result that there is no way to evaluate her qualifications.

Decision

Although it is clear that Robin, in particular, suffered from a variety of serious diseases, it is not clear to what extent either of the plaintiffs' symptoms were the result of mold infestation. Neither Drs. Alpert and Tolston, plaintiffs' treating doctors, showed any expertise in the area of mold infestation and the diseases it causes. Neither of them has shown their experience in treating mold beyond the two patients. While a doctor need not have a special expertise in this area, he/she does have to show that the doctor is knowledgeable by reason of training, education or experience in order to testify as an expert in this area (Prince Richardson on Evidence, p 463 [10th ed] [citing *Mattot v Ward* 48 NY2d 455, 459, 423 NYS2d 645]). Neither of the plaintiffs' "experts" established these credentials. Thus, they lack the appropriate qualifications, and their testimony is, therefore, precluded. Even if they were able to demonstrate the appropriate qualifications, their testimony would still be excluded because they failed to show any ~~causal~~ ^{causal} relationship ^{causal} between the mold particles released in the air and the symptoms complained of by the plaintiff. To do this, they must show that the exposure to mold is capable of causing the particular illnesses complained of (general causation), and that the plaintiffs were exposed to sufficient levels of the mold spores to have caused their illnesses (specific causation)(*Parker v Mobile Oil Corp.*, 71 NY3d 434, 324 NYS2d 584 [2006]). In other words, they must show that they used a method

generally accepted in the scientific community to establish causation, *id.* While many conclusions were made by plaintiffs' "experts", they failed to show any methodology that established the requisite general and specific causation in this case.

Shortly afterwards, the *Parker* decision was followed by the First Department in *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 870 NYS2d 266 [1st Dept 2008]) where the Court stated: "the proffered expert evidence [that mold causes illness] must be precluded on the ground that the underlying cause theory lacks support in the scientific literature placed before us." *id.* at 52 AD3d 418.

The Court is aware that *Cornell v 360 West 51st Street Realty*, 95 AD3d 50, 39 NYS2d 434 [1st Dept 2012]) has placed a wrinkle in what was formerly viewed as a categorical approach by holding that the record established that there was enough evidence to deny a motion to dismiss. This Court still maintains that the record in this case establishes neither a general nor specific causal relationship between their exposure to mold spores and their illnesses. However, close attention should be paid to the record in the future based on this decision.

It is noted that this decision precludes the testimony of plaintiffs' experts. Therefore, the discussion of the causal relationship between mold and their illnesses is mere *dicta*.

Without the testimony of Drs. Alpert and Tolston, plaintiffs cannot establish the element of proximate cause, mandating the dismissal of their complaint

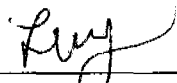
Accordingly, it is

ORDERED and **ADJUDGED** that Drs. Alpert and Tolston are precluded from
testifying as to mold infestation and its effects; and it is further

ADJUDGED that this action is dismissed.

Dated: 3/10/13

Enter:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.