

Albuquerque v Sintra
2013 NY Slip Op 31924(U)
August 13, 2013
Sup Ct, New York County
Docket Number: 104439/05
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCARPULLA
Justice

PART 19

ALBUQUERQUE, HELENA,
ET AL.

INDEX NO. 104439/05

MOTION DATE _____

- v -
JOAO SINTRA, ET AL.

MOTION SEQ. NO. 04

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 8/13/13
which disposes of motion sequence(s) no. 004

FILED
AUG 16 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/13

SALIANN SCARPULLA
SALIANN SCARPULLA J.S.C.

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: CIVIL TERM: PART 19

----- X
HELENA ALBUQUERQUE and DAVID FENYO,

Plaintiffs,

- against -

JOAO SINTRA, A.J. CLARK REAL ESTATE CORP.
and A.J. CLARK MANAGEMENT CORP.,

Defendants.
----- X

Index Number: 104439/05
Submission Date: 7/19/13

DECISION and ORDER

FILED

AUG 16 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

For Plaintiff:
The Law Offices of Marius C. Wesser, P.C.
20 Vesey Street, Suite 1410
New York, NY 1410

For Defendant:
Bonner Kiernan Trebach & Crociata, LLP
350 Fifth Avenue, 59th Floor
New York, NY 10118

Papers considered in review of defendant's motion to preclude (no. 004):

Notice of Motion/Affirmation/Exhibits.....	1
Affirmation in Opp.....	2
Reply Affirmation.....	3

HON SALIANN SCARPULLA, J.:

In this negligence action, defendants Joao Sintra, A.J. Clark Real Estate Corp. and A.J. Clark Management Corp. (collectively, "Defendants") move for an order: (a) precluding plaintiff Helena Albuquerque's treating physician, Dr. Adrienne Sprouse ("Dr. Sprouse"), from testifying at trial on the issue of causation; or (b) in the alternative, directing a *Frye* hearing on Dr. Sprouse's theory of causation.

On March 31, 2005, Helena Albuquerque (“Plaintiff”) commenced this action to recover damages for physical injuries and ailments that she allegedly suffered as a result of exposure to mold in her apartment at 104 Sullivan Street, Apartment 18, New York, NY. During the time of the alleged exposure, Joao Sintra owned the apartment building, and A.J. Clark Real Estate Corp. served as the property manager of the building.

Plaintiff alleges that, as a result of the mold exposure, she developed a generalized allergic response – or “hyper-sensitization” – to numerous other substances such as molds and chemicals.

On or about October 26, 2011, defendants filed a motion for summary judgment dismissing the complaint. On August 15, 2012, I heard oral argument on the motion for summary judgment, and I issued an order on the record dismissing the complaint except for plaintiff’s first cause of action with respect to her hyper-sensitization claim. I found that a triable issue of fact exists as to whether Plaintiff’s hyper-sensitization was caused by the alleged mold condition in her apartment.

At trial, Plaintiff intends to offer testimony from her treating physician, Dr. Sprouse, to prove that her hyper-sensitization was caused by the mold condition.¹ In an affidavit, Dr. Sprouse states that, even though Plaintiff moved out of the apartment in 2006, “the chemicals did not leave her body.” Dr. Sprouse opines that as a “result of the chemical poisonings that the patient sustained in the Apartment, she now has multi-system dysfunction caused by chemicals in other places.” Dr. Sprouse states that “[t]his

¹ At oral argument on August 15, 2012, Plaintiff’s counsel Marius Wesser stated that Plaintiff does not intend to offer testimony from a mold expert.

generalization of response is called ‘spreading’, and the patient now suffers from adverse reactions to many different chemicals. Even small levels of ambient chemicals now make her ill.”

In the current motion, Defendants argue that Dr. Sprouse should be precluded from testifying at trial because: (1) Dr. Sprouse’s conclusions are not accepted in the general scientific community; (2) Dr. Sprouse’s conclusions are not based on scientific data or a logical scientific thought process; and (3) Dr. Sprouse is not qualified to render an opinion on causation because she is not an expert in the field. Defendants argue that Dr. Sprouse’s testimony should be limited to Plaintiff’s treatment and diagnosis because Dr. Sprouse should not be admitted as an expert on causation.

To support their argument that Dr. Sprouse’s theory of causation is not generally accepted in the scientific community, Defendants submit an affidavit from their own expert, Dr. S. Michael Phillips (“Dr. Phillips”). Dr. Phillips states that “there is no relationship between the medical problems experienced by Ms. Albuquerque. . . and exposures to molds.” Further, Dr. Phillips states that “[n]o medical conditions known to science can explain her myriad of subjective complaints and there is no objective physical or laboratory findings to substantiate them.”

In opposition to the motion, Plaintiff argues that the Court previously considered and denied Defendants’ request for a *Frye* hearing on August 15, 2012, when it found that a triable issue of fact exists as to whether Plaintiff’s hyper-sensitization is caused by the

alleged mold condition in her apartment. Plaintiff further argues that Defendants' motion fails to meet the requirements for a motion to reargue or renew under CPLR § 2221.

In reply, Defendants argue that the Court has not yet reached any determination regarding their request for a *Frye* hearing. Defendants further argue that Dr. Sprouse's testimony should be precluded because there is no medical literature or peer reviews to support Dr. Sprouse's causation theory. Defendants also contend that Plaintiff was not exposed to any abnormal level of mold in her apartment.

Discussion

A trial court must conduct a two-step analysis before admitting expert testimony. *Guzman ex rel. Jones v. 4030 Bronx Blvd. Assocs. L.L.C.*, 54 A.D.3d 42, 46 (1st Dep't 2008). First, if the expert's opinion is based upon a novel scientific theory, the trial court must apply the *Frye* test to determine whether the theory is "generally accepted" as reliable within the relevant scientific community. *People v. Wesley*, 83 N.Y.2d 417, 424 (1994); *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006).

The trial court may hold a *Frye* hearing to determine the reliability of a novel scientific theory. *Wesley*, 83 N.Y. at 426. The focus of the *Frye* inquiry should be on "whether a reasonable quantum of legitimate support exists in the literature for [an] expert's views." *Cornell v. 360 W. 51st St. Realty, LLC*, 95 A.D.3d 50, 52 (1st Dep't 2012); *Marsh v. Smyth*, 12 A.D.3d 307, 311 (1st Dep't 2004) (Saxe, J., concurring).

Second, the trial court must determine the “admissibility of the specific evidence—i.e., the trial foundation” which is a separate inquiry that is “the same as that applied to all evidence, not just to scientific evidence.” *Wesley*, 83 N.Y. at 428-429; *Guzman*, 54 A.D.3d at 46-47. At this stage, the focus is on the “specific reliability of the procedures followed to generate the evidence proffered.” *Wesley*, 83 N.Y.2d at 429; *Parker*, 7 N.Y.3d at 46-47.

Here, I grant the defendants’ motion for a *Frye* hearing concerning Dr. Sprouse’s theory of causation.² Dr. Sprouse’s proposed testimony presents a novel scientific theory – i.e., that the type of mold found in Plaintiff’s apartment can cause hyper-sensitization, or a generalized allergic response, to numerous other substances. Defendants’ expert, Dr. Phillips, stated in his affidavit that no medical findings support the theory that Plaintiff’s condition is caused by mold exposure. A *Frye* hearing is appropriate to determine whether there is legitimate support in the literature to allow Dr. Sprouse to testify regarding her theory of causation.

Defendants further argue that Dr. Sprouse’s testimony should be precluded because she is unqualified to render an expert opinion, and because she failed to rely on any scientific process or data in concluding that Plaintiff’s hyper-sensitization was caused by mold. I find that these issues require separate inquiries into Dr. Sprouse’s qualifications, and whether an appropriate foundation exists for Dr. Sprouse’s opinion.

² In my August 15, 2012 decision and order, I did not reach the issue of whether a *Frye* hearing is warranted.

To address these issues, I therefore order a pre-trial hearing to be held simultaneous with the *Frye* hearing. *People v. Wesley*, 83 N.Y.2d 417, 436 n. 2 (1994) (Kaye, J., concurring) (“the *Frye* hearing and foundational inquiry may proceed simultaneously”); *Parker*, 57 A.D.3d 416, 420 (2008); *Kelly v. Metro-N. Commuter R.R.*, 74 A.D.3d 483, 485 (1st Dep’t 2010).

In accordance with the foregoing, it is

ORDERED that defendants Joao Sintra, A.J. Clark Real Estate Corp. and A.J. Clark Management Corp.’s motion *in limine* is granted with respect to their request for a *Frye* hearing, and otherwise denied; and it is further

ORDERED that the parties are directed to appear for a *Frye* / pre-trial hearing on September 13, 2013 at 10:00 a.m., 60 Centre Street, Room 335.

This constitutes the decision and order of this Court.

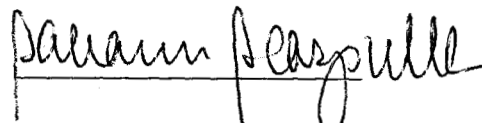
Dated: New York, New York
August 13, 2013

FILED

AUG 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



Saliann Scarpulla, J.S.C.