

Langer v Presidential Prop. Servs. Inc.

2013 NY Slip Op 33706(U)

July 1, 2013

Supreme Court, Bronx County

Docket Number: 303023/10

Judge: Mary Ann Brigantti-Hughes

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

DANIEL LANGER and EILEEN LANGER, X

Plaintiffs,

-against-

DECISION/ORDER

Index No.: 303023/10

PRESIDENTIAL PROPERTY SERVICES INC.,
LOVENTHAL SILVER, LLC., and GOODMAN
MANAGEMENT COMPANY, INC.,

Defendants.

GOODMAN MANAGEMENT COMPANY, INC. X

Third-Party Plaintiff,

Index No.: 83918/11

-against-

SUBURBAN PEST CONTROL OF NEW YORK, INC.,

Third-Party Defendant.

X

The following papers numbered 1 to 5 read on the below motion noticed on **March 12, 2013** and duly submitted on the Part IA15 Motion calendar of **April 18, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.' Aff. In Support of Motion, exhibits	1,2
Pl.'s Aff. in Opp., Exhibits	3,4
Defs.' Aff. In Reply	5

Defendants/third party plaintiff Loventhal Silver Riverdale, LLC, s/h/a Loventhal, Silver, LLC. and Goodman Management Company ("Defendants") move for an Order granting a hearing pursuant to *Frye v. United States*, and thereafter, dismissing the bodily injury claims of the plaintiff Daniel Langer ("Plaintiff") on the basis that Plaintiff cannot show causation between the cessation of use of herbal medicine and Plaintiff's alleged subsequent stroke. Plaintiff opposes the motion.

I. Background

Plaintiff's complaint alleges that he sustained injuries as a result of bed bug infestations that allegedly occurred in April 2009 and August 2009 in apartment "4B" located at 3800 Independence Avenue, Bronx, New York. The premises is owned by defendant Loventhal Silver Riverdale, LLC and managed by defendant Goodman Management Company ("Goodman"). Prior to the alleged infestation, Plaintiff had been taking numerous herbal medications, for the alleged purpose of controlling his blood pressure. Following the alleged incident and injuries, Plaintiff claims that he suffered a stroke because he had stopped taking his herbal medications, due to bedbug bites which he had thought were a rash or reaction to the herbal medications.

On or around March of 2009, Plaintiff testified that he began ingesting natural remedies such as garlic, inositol, hawthorn berries, magnesium oretate, chromium piloca, and folic acid. Plaintiff began getting bed bug bites in March 2009. He thereafter discontinued use of those herbal medication because he had thought that the bites were a rash or reaction to them. Plaintiff testified that on March 25, 2009, he consulted with Dr. Joshua Berger, who diagnosed him with hives. On April 8, 2009, Plaintiff testified that he suffered a stroke. Although he was seen at Montefiore Hospital at the time, there was no diagnosis of a stroke. Thereafter he was prescribed Lipitor (which he did not fill), and Zestril, which he began taking. On April 14, 2009, Plaintiff resumed taking herbal medications. On July 13, 2009, he was admitted to Lawrence Hospital in Bronxville, New York, and diagnosed with having suffered a stroke on that date. In April 2012, Plaintiff was examined by Dr. Ronald M. Silverman, who reported to Plaintiff's counsel that Plaintiff's "small pontine infarct" on July 13 2009 was "most likely related to his history of hypertension and hypercholesterolemia." At deposition, Plaintiff admitted that no doctor had ever told him the cause of the incident on April 8 or stroke of July 13, 2009.

Defendants now seek a *Frye* hearing to determine the reliability of Plaintiff's anticipated scientific evidence that cessation of herbal blood pressure medications caused his injuries.

Plaintiff opposes the motion. Plaintiff initially argues that the motion must be denied since they are moving to preclude "the very claim or part thereof" that had survived an earlier-filed summary judgment motion. Plaintiff also asserts that the motion must be denied because

Defendants have not sufficiently established that Plaintiff's theory of causation is "novel."

II. Applicable Law and Analysis

Primarily, the motion is properly before the Court, despite the earlier denial of Defendants' summary judgment motion. The summary judgment motion did not concern an evidentiary ruling as to whether plaintiff's theories of causation had any generally accepted scientific basis (*Frye v. Montefiore Med. Center*, 100 A.D.3d 28 [1st Dept. 2012]).

The purpose of a hearing pursuant to *Frye v. United States*, F. 1013 (D.C. Cir. 1923), is to determine whether a proffered experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable (*Marsh v. Smyth*, 12 A.D.3d 307 [1st Dept. 2004]). The particular procedure need not be "unanimously indorsed" by the scientific community, but must be "generally accepted as reliable." (*Id.*, citing *People v. Wesley*, 83 N.Y.2d 417, 423 [1994]).

Importantly, the party seeking a *Frye* hearing has the initial burden of showing that there is "a question as to whether [an] expert's methodologies or deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable." (see *People v. Oddone*, 89 A.D.3d 868, 869–70 [2d Dept 2011]; see also *Ellis v. Eng*, 70 AD3d 887, 891–92 [2d Dept 2010].) The moving party must show, in effect, that the proffered evidence is sufficiently "novel" to implicate *Frye* concerns. (See *Lipschitz v. Stein*, 65 AD3d 573, 575–76 [2d Dept 2009]; *Leffler v. Feld*, 51 AD3d 410, 410 [1st Dept 2008]; *Marsh v. Smyth*, 12 AD3d 307, 308 [1st Dept 2004] [Saxe, J ., concurring].)

Defendant here argues that Plaintiff's theory, specifically, that the cessation of herbal blood pressure medication, allegedly due to the bed bugs bites, caused the Plaintiff's subsequent stroke, is "novel" and not based on principals that are generally accepted by the scientific community. Defendant relies on, *inter alia*, the report from Dr. Gerald J. Smallberg, dated July 29, 2009; medical records from Lawrence Hospital; and a sworn report from Dr. Ronald M. Silverman dated April 4, 2012. Although the Smallberg report and medical records are unsworn, they are properly before this Court to support a prima facie showing (see *Franchini v. Palmieri*, 1 N.Y.3d 536 [2003]). The Smallberg report note that the issue of Plaintiff's dietary supplements

“needs to be addressed” but Dr. Smallberg does not opine as to the effect the supplements would have on Plaintiff’s blood pressure medication or condition at the time of exam. The report from Dr. Silverman opines that Plaintiff’s stroke was “most likely related to his history of hypertension and hypercholesterolemia,” but does not address Plaintiff’s cessation of herbal medications. Dr. Silverman’s affirmation, dated March 7, 2013, mirrors the language in his report regarding causation. He does not, however, specifically state that Plaintiff’s causation theory is “novel” or not generally accepted by the scientific community. Rather, it appears that the Defendant’s expert is essentially challenging the credibility of plaintiff’s anticipated expert opinion as to causation, and not the reliability of novel scientific evidence presented (*Page v. Marusich*, 51 A.D.3d 1201 [3rd Dept. 2008], citing *Marsh v. Smyth, supra*. See also *Cabral v. 570 West Realty, LLC*, 73 A.D.3d 674, 675 [2nd Dept. 2010]). Under these circumstances, therefore, Defendant has not satisfied their initial burden of proving entitlement to a *Frye* hearing on this issue.

Nevertheless, any expert testimony on the issue of causation, offered by Plaintiff at the time of trial, will be admitted only if a proper foundation is first established (*see Robinson ex rel. Chapman v. Bartlett*, 95 A.D.3d 1531, 1536 [3rd Dept. 2012]; *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 [2006]).


III. Conclusion

Accordingly, it is hereby

ORDERED, that defendants’ motion is denied.

This constitutes the Decision and Order of this Court.

Dated: July 1, 2013



Hon. Mary Ann Brigantti-Hughes, J.S.C.