

<b>Sillitti v Escobel Corp.</b>
2017 NY Slip Op 30001(U)
January 3, 2017
Supreme Court, New York County
Docket Number: 113173/07
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
ROSALIE SILLITTI, ELIZABETH SCHEIBE,  
STEVEN SCHEIBE, MARIA FLYNTZ,  
THOMAS FLYNTZ, MICHELE BLAUSTEIN,  
ALAN BLAUSTEIN, JOANNE GIOVANNIELLO,  
NICOLE ABBATEMARCO, JENNIFER COLONNA.  
SALLY ANN HODGSON, ELVA CONIGLIARO,

Plaintiffs,

-against-

Index No. 113173/07

ESCOBEL CORP.,

Defendant.

-----X  
**CAROL R. EDMEAD, J:**

Defendant Escobel Corp. moves, pursuant to CPLR 3212 (a) , for summary judgment dismissing the complaint of plaintiff Rosalie Sillitti (Plaintiff). All the other plaintiffs, whose cases have not been dismissed, have settled.

Defendant is the owner of the building located at 56 Sunrise Boulevard in Sayville, New York (the Building), in which plaintiffs worked for some of the time that they were employed by nonparty Liberty Travel. The complaint alleges that the plaintiffs' workplace at the Building was contaminated by mold, and that, as a result, they became ill. Plaintiff, who had been suffering from chronic obstructive pulmonary disease for some years, claimed that her exposure to the mold worsened her condition. Plaintiff died during the pendency of this action.

The following is undisputed. On October 16, 2006, Nasser Victory, a principal of defendant, was notified that a bad smell was coming from the basement under Liberty Travel's

office. Mr. Victory had the maintenance company for the Building inspect the basement. He was told that the basement was wet, and that there might be mold. Three days later, he had nonparty Eastern Environmental Solutions, Inc. (Solutions) inspect the basement and propose a plan to remediate the area. On October 22, 2006, Mr. Uday Singh of I.H. Consultants, Inc. (IH), which was retained by Liberty Travel, inspected the premises, and determined that, while there was water damage in Liberty Travel's bathroom and back office, there was no mold growth in those areas. Mr. Singh found concentrations of Aspergillus/Penicillium in the basement, but at levels that he deemed too low to pose a health hazard. From October 24 to November 10, 2006, the Liberty Travel office was closed, while Solutions performed remediation work, cleaning all surfaces and removing all air contaminants. Thereafter, although plaintiffs continued to complain of bad smells, multiple inspections of the premises found neither visual evidence of mold, nor air borne spore counts exceeding ambient conditions outside.

Specifically, on October 23, 2006, I.H. reported that the middle of Liberty Travel's front office, its West side front office, and its back office showed, respectively, 100, 53, and 733 mold spores per cubic meter, as compared to 1,973 spores per cubic meter outside. I.H. inspected the premises again on November 17, 2006, and reported that bioaerosal samples collected in Liberty Travel's front and back offices had spore counts not exceeding conditions outside. On December 23, 2006, Professional Building Inspectors reported to Liberty Travel that EMSL Analytical, Inc. performed greased slide analysis of fungal spores and other airborne particulates by optical microscopy and found concentrations of 10 counts per cubic meter of Aspergillus/Penicillium in the office, as compared to 160 units per cubic meter outside. On May 14, 2007 Enviro Inspection Services, Inc. reported to Liberty Travel that, while swab tests showed a variable mold/fungal

spore count ranging from rare to high, air sampling indicated “a very low spore count in all areas tested.” Pecorelli, affirmation, exhibit Q at 2. On May 21, 2007, Solutions conducted a site visit and found no visual evidence of mold.

Plaintiff, who had been working in Liberty Travel’s Riverhead, New York office, came to work in the Sayville office only after Solutions had completed its remediation work. That office was closed again, from November 21, 2006, to January 2, 2007, for nonmold-related repairs. All told, excluding weekends, plaintiff Sillitti, unlike the other plaintiffs, all of whom had worked in the Sayville office before the remediation work commenced, was present in the Sayville office between November 12 and November 20, 2006, for six days, and again from January 2 to an unspecified date in April 2007, when she ceased work. As noted above, multiple tests of air quality showed that there were no elevated spore counts in the Sayville office during the time that plaintiff worked there. Accordingly, defendant has made a prima facie showing that is entitled to summary judgment.

In opposition to the motion, Plaintiff presents the expert opinions of Stephen Patrick Bates, Ph.D., CIH, CSP, and Eckhart Johannung, M.D. M.Sc., Ph.D. Dr. Bates criticizes the methods used by the contractors that defendant and Liberty Travel retained to ascertain whether, and if so, to what extent, mold was present at the premises, but he offers no opinion as to the impact, if any, of mold on Plaintiff’s health. Moreover, his criticisms are that the contractors failed to follow the standards set by the United States Occupational Safety and Health Administration (OSHA). The OSHA standards, however, are not binding upon defendant, which was not plaintiff’s employer. More basically, the OSHA publication, “A Brief Guide to Mold in the Workplace,” <https://www.osha.gov/dts/shib/shib101003.html>, on which Dr.

Bates relies, states that “[c]urrently, there are no federal standards or recommendations . . . for airborne concentrations of mold or mold spores.” With regard to the basement, Dr. Bates, notes that “the particle sizes of [mold] spores lend[] themselves to becoming airborne and spreading to adjacent areas.” Alvarado affirmation in opposition, exhibit B at 4. However, Clark R.

Lovensheimer, Jr., CSP, notes in his affidavit that:

“The basement area of the subject Liberty Travel office is not accessible from the Liberty Travel office areas. The basement can only be accessed via a stairwell located at the rear exterior of the building.”

Dischley, reply affidavit, exhibit 1 at 6. Accordingly, Dr. Bates’s general remark about the mobility of mold spores is inapposite, inasmuch as the Liberty Travel office was not “adjacent” to the basement in any relevant way.

Doctor Johanning opines that:

“it is more likely than not the exposure to the described excessive dampness and mold at [plaintiff’s Sayville] workplace would have contributed substantially as a causal agent to [the] rapid worsening of [plaintiff’s] respiratory condition that ultimately led to her demise.”

Alvarado, affirmation in opposition, exhibit C at 15. Dr. Johanning’s conclusion is based on his view that plaintiff’s pulmonary condition worsened from September 2006 to April 2007. *See id.* at 14. However, defendant’s expert, Mark Spero, M.D., PLLC, who accepts for the sake of argument that plaintiff had significant exposure to *Aspergillus*, notes that plaintiff’s medical history:

“clearly indicates that [her] pulmonary function was markedly abnormal as early as September 2004, significantly worse in November 2004 and worse yet again in January 2005. In particular, if we look at FEV1, which is the volume expired during a single forceful breath during the first second of that breath it is obvious that Ms. SILLITTI had worse function in 10/04 and 1/05 than she did after her exposure to mold at the end of 2006 and the beginning of 2007.”

Dischley, reply affidavit, exhibit 3 at 2.

In sum, plaintiff has failed to present any evidence that, in fact, she was exposed to mold while working at the Liberty Travel office, or that during the course of her work there, her health became worse than it had been before she came to the Sayville office.

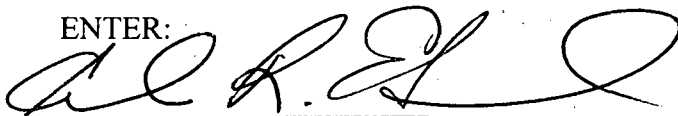
Accordingly, it is hereby

ORDERED that the motion of defendant Escobel Corp. for summary judgment is granted and the complaint is dismissed with costs as taxed by the Clerk of the Court upon a presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 3, 2017

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL R. EDM EAD**  
J.S.C.