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| <b>Brightman v Sim</b>                                                                                                                                                                                                         |
| 2019 NY Slip Op 32397(U)                                                                                                                                                                                                       |
| August 12, 2019                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 150302/2015                                                                                                                                                                                                     |
| Judge: Barbara Jaffe                                                                                                                                                                                                           |
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# SUPREME COURT OF THE STATE OF NEW YORK

## NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM  
Justice

-----X  
LORI BRIGHTMAN,  
  
Plaintiff,  
  
- v -  
  
INDEX NO. 150302/2015  
  
MOTION DATE  
  
MOTION SEQ. NO. 002

ALICE SIM,

## DECISION + ORDER ON MOTION

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 46-60, 63-83  
were read on this motion to dismiss.

Defendant moves pursuant to CPLR 3211(a)(5) and 214-c for an order dismissing the  
complaint. Plaintiff opposes.

### I. VERIFIED COMPLAINT (NYSCEF 48)

In her verified complaint, plaintiff alleges that she was defendant's tenant and that she  
was injured due to the presence of mold in the apartment.

### II. CONTENTIONS

#### A. Defendant (NYSCEF 46-59)

Defendant contends that plaintiff's complaint should be dismissed because her claims are

time-barred. She asserts that the three-year statute of limitations runs from when plaintiff discovered her injury, not when she discovered the cause of it. She relies on plaintiff's medical records reflecting that she first reported experiencing symptoms in late 2011 (NYSCEF 53-58), and her testimony that some of her symptoms developed before January 2012 and others as early as 2010 (NYSCEF 51).

B. Plaintiff (NYSCEF 63-82)

In opposition, plaintiff contends that the nature of her injury could not be determined until the apartment was known to contain toxic levels of mold which did not occur until January 12, 2012, when it was inspected. Thus, she denies that her complaint is time-barred. While she acknowledges that the statute of limitations runs from the date of the discovery of her symptoms, she contends that she only knew of an unconnected "constellation of symptoms," and that a dismissal of her complaint based on it, without a diagnosis relating it to toxic mold, would be "absurd." She references a doctor's report reflecting that certain of her symptoms had recurred over a ten-year period. (NYSCEF 65).

While some of her symptoms date back to October 2010, plaintiff claims that they were too isolated to trigger the statute of limitations, and notes that they did not progress or worsen over the first three months following her discovery of the mold and that she was able to work until June of 2013. Plaintiff thus argues that the statute of limitations should not begin to run until January 12, 2012, when the mold condition was first detected.

Even if the statute of limitations began running in 2010, plaintiff contends that until she vacated the apartment, she was continually exposed to the mold, and thus, was subject to a continuing tort. In support, plaintiff submits mold inspection reports (NYSCEF 67-71) and spore trap analysis reports (NYSCEF 72-75), as well as a doctor's report reflecting that her condition

had substantially worsened from the time the mold was first detected in January 2012 (NYSCEF 65).

### C. Reply (NYSCEF 83)

In reply, defendant argues that having acknowledged that all of her symptoms manifested themselves over three years before she filed her complaint, plaintiff's continued exposure to mold is irrelevant, as the statute of limitations begins to run when symptoms first manifest themselves. Defendant also relies on plaintiff's testimony in which she states that she suffered no symptoms for ten years and that the medical report reflecting otherwise is wrong. Defendant denies that plaintiff's ailments were too mild or inconsequential for the statute of limitations to commence running, observing that they were serious enough for plaintiff to seek medical treatment for them in 2011. Defendant also observes that although plaintiff did not conduct environmental testing until January 2012, she had nearly two years to file suit and failed to do so.

### III. ANALYSIS

Pursuant to CPLR 3211(a)(5), a defendant seeking dismissal of an action as time-barred bears the initial burden of proving, *prima facie*, by affidavit or other competent evidence, that the time in which to sue has expired. (*Kuo v Wall St. Mortg. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009]). If the defendant meets its burden, the burden shifts to the plaintiff to establish that, accepting the complaint as true and affording it the benefit of every favorable inference (*In re Schwartz*, 44 AD3d 779, 779 [2d Dept 2007]), its cause of action falls within an exception to the statute of limitations or to raise an issue of fact as to whether an exception applies (*Gravel v Cicola*, 297 AD2d 620, 621 [2d Dept 2002]).

A cause of action based on exposure to mold is subject to a three-year statute of limitations, measured "from the date of discovery of the injury by the plaintiff or from the date

when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff.” (CPLR 214-c[2]; *Byrd v Pinecrest Manor*, 82 AD3d 813, 815 [2d Dept 2011], quoting *Searle v City of New Rochelle*, 293 AD2d 735, 736 [2d Dept 2002] [“A plaintiff’s cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e. when the injury is apparent, not when the specific cause of the injury is identified.”]).

It is undisputed that plaintiff began experiencing symptoms as early as October of 2010. That her symptoms may have changed from mild to permanent or chronic does not render plaintiff’s claims timely, absent evidence of new symptoms. (*See Sullivan v Keyspan Corp.*, 155 AD3d 804, 807 [2d Dept 2017], *lv dismissed in part, denied in part* 31 NY3d 1141 [2018] [claim time-barred where plaintiff failed to allege “that the contamination independently resulted in some new injury within the statute of limitations period that is distinct and qualitatively different from prior injuries”]; *Chavious v Tritec Asset Mgmt., Inc.*, 284 AD2d 362, 363 [2d Dept 2001] [that symptoms “worsened and became a permanent condition, and that different and more severe symptoms developed” does not extend the statute of limitations]; *cf Gordon v ROL Realty Co.*, 150 AD3d 466, 466 [1st Dept 2017] [denying motion to dismiss where issue of fact existed as to whether plaintiff suffered from “new” and “qualitatively different” symptoms]). Nor does continued exposure extend the limitations period. (*See Suffolk Cty. Water Auth. v Dow Chem. Co.*, 121 AD3d 50, 59 [2d Dept 2014] [continuous wrong exception does not apply to CPLR 214-c]; *Whitney v Quaker Chem. Corp.*, 90 NY2d 845, 847 [1997] [that plaintiff’s “symptoms worsened and changed” did not make claim timely]; *Annunziato v City of New York*, 224 AD2d 31, 40 [2d Dept 1996] [that plaintiffs were “still being exposed to toxic emissions from the landfills would not affect the accrual date of their causes of action since the date of discovery of

the injury is the key under CPLR 214–c, and there is no continuing-wrong exception to the comprehensive rules in CPLR 214–c”)).

As plaintiff’s symptoms manifested in October 2010 and she did not file her complaint until January 2015, her claims are time-barred.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss is granted, and plaintiff’s complaint is dismissed.

8/12/2019

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

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| <input checked="" type="checkbox"/> | CASE DISPOSED              |                                 |
| <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/> DENIED |
| <input type="checkbox"/>            | SETTLE ORDER               |                                 |
| <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN |                                 |

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| <input type="checkbox"/> | NON-FINAL DISPOSITION |                                    |
| <input type="checkbox"/> | GRANTED IN PART       | <input type="checkbox"/> OTHER     |
| <input type="checkbox"/> | SUBMIT ORDER          |                                    |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE: