

Dowell v Est Trish, LLC
2019 NY Slip Op 34277(U)
September 4, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 2014EF5170
Judge: Donald A. Greenwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on August 27, 2019.**

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

JOSEPH A. DOWELL and LINDA DOWELL,

Plaintiffs,

v.

**EST TRISH, LLC d/b/a STANLEY STEEMER OF
SYRACUSE, MEDICAL CENTER REALTY, LLC,
4000 MEDICAL CENTER DRIVE, LLC, ST.
JOSEPH'S MEDICAL, P.C., ST. JOSEPH'S
HOSPITAL HEALTH CENTER, ST. JOSEPH'S
PHYSICIAN HEALTH, P.C., ST. JOSEPH'S
PHYSICIANS, NORTHEAST MEDICAL
PROPERTIES, LLC, NORTHEAST FAMILY
PHYSICIANS, NORTHEAST MEDICAL CENTER,
NORTH MEDICAL, P.C., DICKINSON
ENVIRONMENTAL CONSULTING, LLC;
AEROBIOLOGY LABORATORY ASSOCIATES,
INC., ST. JOSEPH'S HEALTH CENTER
PROPERTIES, INC., SUMMIT REALTY
MANAGEMENT, INC., A.J.M. MANAGEMENT
SERVICES, INC., STANLEY STEEMER
INTERNATIONAL, INC. and JOHN DOE, the name
being fictitious and unknown to the plaintiffs, the
person or party intended being the franchisor, if any,
of EST TRISH, LLC d/b/a STANLEY STEEMER OF
SYRACUSE, JOHN DOE #1, JOHN DOES #2-10,
JOHN DOES #11-20, JOHN DOES #21-30,
JOHN DOES #31-40,**

Defendants.

**DECISION AND ORDER
ON MOTION**

**Index No.: 2014EF5170
RJI No.: 33-15-1008**

APPEARANCES:

JAN S. KUBLICK, ESQ., OF McMAHON, KUBLICK & SMITH, P.C.
For Plaintiff

JULIE M. CAHILL, ESQ. and MATTHEW J. LARKIN, ESQ., OF BARCLAY DAMON, LLP
For Defendants Medical Center Realty, LLC, 4000 Medical Center Drive, LLC, Northeast
Medical Properties, LLC; North Medical Center, P.C. d/b/a Northeast Family Physicians
i/s/h/a Northeast Family Physicians, East Medical Center, L.P. d/b/a Northeast Medical
Center i/s/h/a Northeast Medical Center, North Medical, P.C., Summit Realty
Management, Inc. and A.J.M. Management Services, Inc.

CATHERINE A. GALE, ESQ, OF GALE, GALE & HUNT, LLC
For Defendants St. Joseph's Medical, P.C., St. Joseph's Hospital Health Center, St.
Joseph's Physician Health, P.C., St. Joseph's Physicians, St. Joseph's Health Center
Properties, Inc.

JEFFREY D. SCHULMAN, ESQ., OF PILLINGER, MILLER, TARALLO, LLP
For Defendant Dickinson Environmental Consulting, LLC

KRISTEN M. BENSON, ESQ., OF SMITH, SOVIK, KENDRICK & SUGNET, P.C.
For Defendants Est Trish, LLC d/b/a Stanley Steemer of Syracuse and Stanley Steemer
International, Inc.

This case arises out of alleged mold exposure suffered by the plaintiff while employed as a nurse by defendant St. Joseph's Medical, P.C. Plaintiff claims that the exposure resulted from a flooding incident which occurred between August 3, 2013 and August 5, 2013 in Suite 101, of the Northeast Medical Center in Fayetteville, New York. The flood occurred in bathroom 1-17 of Suite 101A and permeated into Suite 101B. Plaintiff worked in Suite 101C and never entered either of the other two suites. The suites were owned by Medical Center Realty, LLC and leased by St. Joseph's Health Center Properties, Inc. (SJHCP) pursuant to a lease agreement dated January 1, 2011. On the same day, SJHCP executed an assignment, assigning its right, title and interest in the lease to St. Joseph's Medical, P.C. Plaintiff claims that the exposure resulted in several respiratory illnesses and the need for a lung transplant. The complaint asserts causes of

action for negligence and also contained a loss of consortium claim that was subsequently withdrawn. All of the defendants have moved for summary judgment dismissal of the complaint. Due to the voluminous nature of the record here, all of the parties have stipulated to a list of global exhibits.

I. SUMMARY JUDGMENT MOTION OF DEFENDANTS EST TRISH, LLC d/b/a STANLEY STEEMER OF SYRACUSE AND STANLEY STEEMER, INTERNATIONAL, INC. (hereinafter collectively referred to as Stanley Steemer)

Stanley Steemer is a water restoration company which was retained by St. Joseph's Medical, P.C. to perform the water extrication and applied structural drying phase of the remediation project following the flood that is the subject of this litigation. Defendant Dickinson Environmental Consulting, LLC (Dickinson) was likewise retained by St. Joseph's Medical, P.C. to perform air monitoring on the premises through the remediation project following the flood. Stanley Steemer operates pursuant to a Franchise Agreement with Stanley Steemer, International, Inc., an Ohio Corporation. The local entity is owned by Jeffrey Trisciani, and Kevin Dausman serves as the as the Restoration Manager. Defendant Stanley Steemer International, Inc. as franchisor of Stanley Steemer of Syracuse has established that it is entitled to summary judgment as it did not exercise sufficient control to impute vicarious liability. A franchisor is not vicariously liable for the acts of a franchisee unless the franchisor exerts control over day to day operations of its franchisee. *See, Niagara Foods, Inc. v. Ferguson*, 111 AD3d 1374 (4th Dept. 2003). Plaintiff has failed to raise an issue of fact in this regard and as such the motion for summary judgment dismissal of Stanley Steemer International, Inc. is granted.

The remaining Stanley Steemer defendants predicate the motion for summary judgment on a number of grounds, including, *inter alia*, that Stanley Steemer owed plaintiff no duty, even if it owed plaintiff a duty that it was not negligent inasmuch as the restoration work fell within the standard of care. As the proponent of the motion for summary judgment dismissal, it is required to establish its entitlement to dismissal as a matter of law through the submission of admissible, non-speculative evidence. *See, Hunt v. Kostarellis*, 27 AD3d 1178 (4th Dept. 2006). Stanley Steemer has done so here.

The voluminous submissions from Stanley Steemer demonstrate the following facts. Stanley Steemer was retained to perform water restoration and drying work in the affected area. Dausman reported to the site with Lyle Dodge, who are both certified pursuant to standards promulgated by the Institute for Inspection, Cleaning and Restoration Certification (IICRC) in the areas of water restoration training and applied structural drying. These are industry wide standards which were developed to provide the highest quality, concepts, terminology and procedures recognized in the cleaning and restoration industry. Those guidelines are set forth in a manual entitled "SSU: Water Restoration Technician and Applied Structural Drying." Upon arrival at the medical center, they surveyed the affected area to ascertain its boundaries and began extricating water from the affected carpeting and other wet floor surface areas with truck mounted units. The units sucked the water from the building and discharged it into a dump tank in the truck. They also removed the baseboards from the affected walls and drilled holes in the affected wall cavities to begin the drying process. They remained onsite for five days. According to Dausman, the initial survey yielded no evidence of mold and none was found on the premises for the duration of the work. They deployed air blowing devices, air scrubbers and

dehumidifiers to dry the premises. These are commonly used in the field of water restoration and structural drying. In addition, plastic containment had been deployed throughout the affected area for purposes of preventing air from moving into unaffected areas. HEPA filter air scrubbers were also positioned both inside and outside the containment. When the work was concluded on August 9, 2013, Stanley Steemer assessed the moisture levels on the premises as sufficient in light of the remainder of the remediation project, which entailed removal and demolition work to be performed by other entities, according to Dausman. This defendant was not asked to perform demolition or removal work as part of the remediation project and it did not enter a contract with anyone to perform this work. Instead, S.J. Thomas, another contractor and non-party, was retained to complete the tear down and demolition work. Dickinson investigated air quality and provided mold assessment services throughout the remediation project and completed a five hour walk through of the affected area on August 7, 2013 and did not observe any mold growth.

Owner Richard Dickinson returned to the site periodically to monitor air quality. He created two reports in 2013; the first one dated August 9, 2013 and the second on September 5, 2013, when the project was complete. He did not discover any mold on the premises until August 14, 2013 when it was visible behind the walls that had been torn down in the bathroom 1-17 of Suite 101A by S.J. Thomas. This was reflected in the addendum to the initial report of that date. According to Dickinson e-mails, when S.J. Thomas tore down the walls in that bathroom on August 14, 2013 containment was already in place and thus there was no mold released in the premises when mold spores were uncovered. Dickinson testified that the drying measures implemented by Stanley Steemer at the start of the project were proper because there was no initial discovery of mold and containment was not necessary as a result. He testified that the purpose of the August

14, 2013 addendum was to report on the reclassification of the flood from a Category 1 to a Category 2 to 3 after he was told by St. Joseph's Medical P.C. employees that the flood water came from the toilet bowl rather than the tank. He explained the new category required the removal and tear down of all wet materials on the premises, including both sides of the common walls and the affected area. He further testified that S.J. Thomas' tear down of the walls of the bathroom revealed mold in the wall cavities and the mold was not capable of being observed until the wall was cut. In addition, he stated that when the walls were being cut containment had already been implemented in the affected area. Dickinson did not find any evidence of mold or other contaminants outside the containment zone during the project and the conclusion was further informed by bioaerosol testing conducted both inside and outside the containment area in the work zone, as well as area in the premises outside of the work zone and explained that any spore concentration equal to or lesser than outdoor concentration levels was well within the normal range. No contamination was ever located outside the work zone and testing of the lobby outside Suite 101A as well as nurses' stations A and B yielded concentration levels well below outdoor levels and within the normal range. The spore concentration noted on August 16, 2013 of 733 Penicillium/Aspergillus in the lobby/reception area as compared to the outside air of 53 was a relatively low concentration and not evidence of mold contamination and considered to be insignificant by Dickinson as based on the National Allergy Bureau Scale. Dickinson noted that there was a 747 outdoor concentration level on August 22, 2013 and the concentration in the lobby on that date had dropped to 13. He testified that the testing performed outside the contamination zone did not raise any level of concern. Air quality testing in Suite 101C where plaintiff worked was not needed because Dickinson tested what he described as the epicenter of

the affected area outside the containment zone. By August 16, 2013 air quality and moisture levels were completely restored to pre-loss conditions.

With respect to the issue of duty, Stanley Steemer has established that it was retained to perform water restoration work and drying work for the sole benefit of St. Joseph's Medical, P.C. and that plaintiff was not an intended third party beneficiary and thus was owed no duty. A defendant cannot be deemed negligent as a matter of law if he did not owe a legally recognized duty of care to the plaintiff. *See, Hamilton v. Biretta Corp.*, 96 NY2d 222 (2001). The injured party must show the defendant owed not merely a general duty to society but a specific duty to him or her; without a duty running directly to the injured person there is no liability or damages however careless the conduct or foreseeable the harm. *See, Lauer v. City of New York*, 95 NY2d 95 (2000). An alleged breach of contract does not create a tort duty to a third person who is not a party to the contract and not an intended third party beneficiary. *See, Church v. Callahan Industries*, 99 NY2d 104 (2002). There are only three exceptions to the general rule: where the contracting party defendant in failing to exercise reasonable care in the performance of his duties launches a force or instrument of harm; where the plaintiff detrimentally relies on the continued performance of the contracting party defendant's duties and where the contracting party defendant has entirely displaced the other party's duty to maintain the premises safely. *See, Epinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).

This defendant has established in the first instance that none of the exceptions apply. Plaintiff does not argue that the third exception is applicable here. With respect to the launching of a force or instrument of harm, the exception is triggered upon a showing that the defendant made a condition worse or less safe; a mere failure to mitigate a dangerous condition or failure to

repair is insufficient. *See, Sniatecki v. Violet Realty, Inc.*, 98 AD3d 1316 (4th Dept. 2012); *see also, Kerwin v. Fusco*, 138 AD3d 1398 (4th Dept. 2016); *see also, Lingenfelter v. Delevan Terrace Assoc.*, 149 AD3d 1522 (4th Dept. 2017). This exception does not apply where the proof shows, as it does here, that the defendant ended its contractual obligations. *See, Siegl v. New Plan Excel realty Trust, Inc.*, 84 AD3d 1702 (4th Dept. 2011). Stanley Steemer has shown that this exception is inapplicable because there is no evidence that it took any actions to render the premises less safe as it performed its contractual duties in accordance with standards in the water restoration and drying industry, and that its duties were fulfilled on August 9, 2013, at which time the project transitioned into the demolition phase. It has also established that plaintiff could not have been exposed to mold until at earliest August 14th when it was found in the wall cavities. With respect to the detrimental reliance exception, Stanley Steemer has established that it completed its work under its contract and that there were no continued duties upon which plaintiff could have detrimentally relied. *See, Moran v. Schenectady*, 47 AD3d 1001 (3rd Dept. 2008). The record shows that it completed its contractual duties after five days on the premises, performed the work in accordance with industry standards and determined that the moisture readings provided sufficient levels to allow the commencement of the demolition phase, for which other entities were responsible.

Plaintiff's opposition to the motion and argument that the two *Espinal* exceptions apply is insufficient and fails to raise a question of fact. Plaintiff contends that although Stanley Steemer did not create the flood, it exacerbated the conditions then existing by failing to properly categorize it and by subsequently setting up blowers without containment which caused mold and other particulate to become dislodged and contaminate the air throughout the premises. Plaintiff

further claims that the fact that Stanley Steemer placed sixteen air movers throughout the suites and allowed them to blow throughout with no containment established constituted launching a force or instrument of harm. Plaintiff, however, offers no expert opinion or scientific evidence for this claim. Plaintiff's submissions fail to make a sufficient showing that this defendant made the condition worse or less safe. *See, Sniatecki, supra*. The allegation, without support in fact or law, that Stanley Steemer launched a force or instrument of harm by failing to independently investigate the source of the flood is outside the scope of the first *Espinal* exception. Plaintiff's own submissions support this finding as he cites to the language in the restoration manual which shows containment is only advisable if mold is present. As does the submission of the affidavit of Sherri St. James, a co-worker, who states that containment might have been present during the first week of the remediation project, thus undermining the claim that no containment was present until August 14, 2013. Inasmuch as plaintiff has offered no proof, scientific or otherwise, that the absence of containment exacerbated a dangerous condition, plaintiff cannot create a question of fact by attempting to draw a connection between the absence of containment and the alleged propagation of mold. The argument is also belied by the fact that no mold discovered on the premises until August 14, 2013.

Likewise, plaintiff has failed to establish the presence of the second *Espinal* exception of detrimental reliance. He argues that plaintiff was totally dependent upon Stanley Steemer to completely dry the premises and ensure his safety and that it failed to positively or actively perform its obligations when did not appropriately categorize the type of flood, properly apprise plaintiff of the dangers and when it set up blowers throughout the premises with no containment. However, this exception applies when a defendant's performance of a contractual obligation

induces the plaintiff to detrimentally rely on the continuation of performance. *See, Kirwan, supra*. This was not the case here. The nexus for a tort relationship between defendant's contractual obligation and the injured non-contracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral. *See, Palka v. Service Master Management Services Corp.*, 83 NY2d 579 (1994). The record shows here that Stanley Steemer was one of three contractors engaged to remediate the premises, that co-defendant Dickinson was responsible for monitoring and reporting on air quality, that non-party S.J. Thomas was retained to perform the demolition and removal phase of the project. Plaintiff has failed to present evidence that he detrimentally relied on Stanley Steemer's continued performance while these other entities remained at work on the project through its later phases. Plaintiff admitted during his deposition that he did not know what work Stanley Steemer did on the project as "I wasn't privileged to that information." Thus, plaintiff has failed to raise an issue of fact as to whether Stanley Steemer owed him a duty.

Even if this Court found that a duty was owed as a matter of law, plaintiff has failed to raise an issue of fact as to whether Stanley Steemer's restoration work fell within the standard of care and whether it acted with the level of skill and care used by others in the water restoration industry. *See, Reis v. Volvo Cars of North America*, 24 NY3d 35 (2014). A defendant may establish as a matter of law that there was no deviation from the standard of care by submitting his own affidavit, deposition testimony and other documentary proof. *See, Moyer v. Roy*, 152 AD3d 1188 (4th Dept. 2017). Stanley Steemer done so and has provided evidence in the first instance that it was not negligent for inaccurately categorizing the flood water, failing to implement containment, failing to sufficiently dry the premises, failing to use proper products to

kill mold and failing to supervise its staff and warn others of potential dangers. The Dausman and Trisciani affidavits show that both are certified in accordance with standards promulgated by the IICRC and that this defendant's remediation was completed in strict compliance with industry guidelines and protocol. It has likewise shown that despite plaintiff's claim that Stanley Steemer breached industry standards by failing to ascertain the proper category of flood waters, there is nothing in the restoration manual that mandated this defendant to engage in a specific inquiry to definitively measure the category and class of flood. The record shows that no entity involved with the project assessed the flood water as Category 2 to 3 until nearly one week after discovery. Stanley Steemer's role was only to extract the flood waters and undertake drying procedures. Plaintiff's allegation that it was negligent for leaving the premises before the area was dry is likewise without merit inasmuch as it left on August 9, 2013 when the moisture levels were sufficient for the remainder of the project to proceed, which primarily entailed demolition work to be completed by S.J. Thomas. Likewise, the contention that it failed to implement containment around its drying devices is belied by the proof which shows that plastic containment was deployed near the start of the remediation project and Stanley Steemer has shown that such containment was not necessary until mold was visible on the premises, according to the restoration manual. Stanley Steemer has established for purposes of its motion that no mold was observed in the air until August 14, 2013 and thus even if it did not implement plastic containment around its drying devices it did not deviate from the standard of care because no containment was required until mold was uncovered, over one week later after Stanley Steemer's work was complete.

Plaintiff attempts to raise an issue of fact regarding this issue through the affidavit and addendum of David Duford, a Certified Industrial Hygienist. In the initial affidavit Duford asserts that Dickinson, not Stanley Steemer, should have categorized the water as Category 2 to 3. He provides no discussion of how the different categorization would have prompted different actions on the part of any remediation contractor. The addendum merely states that the failure to properly categorize the flood water allowed the clean up restorer to proceed without contamination controls with no further explanation. However, Duford did not specify any purported industry standards relied upon. Although plaintiff alleges that Stanley Steemer deviated from the standard of care by failing to implement containment around its air blowers, purportedly based on the Stanley Steemer restoration manual which incorporates the IICRC Guidelines, it is undisputed that containment was present by the time mold was discovered on August 14, 2013. The language of the restoration manual states that "if [mold] growth is located a good practice is to close off airflow of any kind and contain the growth." *Restoration Manual*. Duford's affidavit fails to provide any basis for plaintiff's argument that Stanley Steemer was negligent for failing to properly categorize the flood water. Nor does plaintiff point to any language in the manual or elsewhere mandating restoration employees to independently investigate the flood water category. With respect to the claim that Stanley Steemer was negligent for leaving the premises on August 9, 2013, the record shows that it assessed moisture levels as sufficient on August 9, 2013 in light of the forthcoming demolition work. As such, the plaintiff has failed to raise an issue of fact as to whether Stanley Steemer was negligent by failing to comply with its own standards.

Based upon the foregoing, the complaint is dismissed against the Stanley Steemer defendants as are the related cross-claims.

II. SUMMARY JUDGMENT MOTION OF DEFENDANT DICKINSON ENVIRONMENTAL CONSULTING, LLC (hereinafter Dickinson)

Similarly Dickinson moves for summary judgment dismissal of the complaint against it in its entirety, as well as additional relief. Inasmuch as this Court finds that Dickinson did not owe a duty to the plaintiff as a matter of law, it will not reach any of its other arguments. There is no dispute that it was not until two days after the flood, on August 7, 2013, that Richard Dickinson, this defendant's owner, was contacted. Dickinson was contracted to preform a mold/moisture assessment in Suites 101A and 101B and to conduct an inspection and analysis of the extent of mold and water damage in those suites. The work authorization lists St. Joseph's Medical P.C. as the client and its employee Vicki Voss as the contact person with Dickinson being listed as the consultant. It states that Dickinson was responsible for that assessment, which was limited to "a site walk-through, air surface and sampling as appropriate and moisture and RH [relative humidity] measurements." *Work Authorization*. The terms and conditions of the authorization further state that "client agrees that services not specifically described in the Scope of Services identified in consultant's proposal are not the responsibility of the consultant." *Id.* It further provided that the authorization "represents the entire agreement between the parties and supercedes any and all agreements between the parties..." *Id.* Thus Dickinson has shown that there is no evidence that it was authorized or contracted to maintain and control the premises, supervise and/or oversee the clean up and noxious organism removal and/or abatement at the premises. The terms of the authorization also specifically state that "client shall bear sole

responsibility for overall job site safety ..." and that the "client shall bear sole responsibility for ... (c) providing and updating consultant with accurate information regarding existing conditions ... [and] client releases consultant from liability for any incorrect advice, judgement or decision based on inaccurate information furnished by client or others." *Id.*

Dickinson's testimony demonstrates that when he arrived the containment area had already been established and the drying equipment had been put into place. Voss informed him that the water originated from an overflowing toilet tank. He then conducted an inspection of the impacted area over the next few hours, focused on determining whether mold was present and the extent of the water intrusion via visual inspection. He collected moisture readings of compromised area for the purpose of defining the moisture zone in recommending removal of materials such as that the possibility of microbial contamination was restricted or eliminated. He also testified he conducted a visual inspection and took moisture readings and air samples both inside and outside of the containment area. During the initial inspection there was no visible mold and the air samples were within the Environmental Protection Agency (EPA) guidelines when compared to outdoor air quality. He completed a report dated August 9, 2013. On that date he sent his bioaerosol (mold) and moisture assessment with a floor plan corresponding to his findings to Voss who he understood to be his main contact regarding the flood. His report designated the water as Category 1 based on the information he was given, meaning that the source of the water was an overflowing toilet tank. As a result, Dickinson recommended that the sink and flooring be removed in the clean utility and soiled utility rooms and that cabinets be removed from the nurses' stations. The report stated the material should be removed as quickly as possible. Dickinson's report was forwarded to Derrick Murphy, the Chief Operating Officer

of SJHCP and representatives of Stanley Steemer on the same day, providing a recommendation that the contractor “proceed as soon as possible removing the wet materials to mitigate this loss ... Time is of the essence.” *Dickinson August 9, 2013 report*. The report also included a diagram showing what walls would need to be cut so the interior cavities could dry out and be inspected and cautioned that “destructive/invasive techniques are not employed in routine IAG (Indoor Air Quality) inspections; therefore the extent of contamination on interior wall or foundation materials, etc. was not assessed.” *Id.* The report further stated the project manager must make these assessments as the work proceeds and that a follow up would be conducted during the tear out and drying process to determine the condition of the wall cavities. *See, id.* After contractors employed by St. Joseph’s completed the demolition and cleaning, Dickinson would again inspect the site to determine the condition, including a visual inspection and bioaerosol concentrations. The EPA guidelines were referenced citing outdoor spore concentrations as a means of evaluating proper indoor concentration. St. Joseph’s Hospital (the Hospital) employee John Wells testified that he received Dickinson’s report indicating which walls needed to be cut out. He admitted it was his responsibility to ensure that walls that were wet were cut out and that insulation inside be removed so the interior cavities could dry out. When Dickinson performed a routine site inspection on August 14, 2013, five days later, he indicated the walls needed to be cut out as soon as possible and only some of the wet walls had been cut open. Of those that had been opened Dickinson performed a visual inspection and mold was observed in bathrooms 1-16 and 1-17 in Suite 101A. Air samples showed elevated counts of contamination inside that containment zone. Dickinson was then informed that the source of the flood water was from a clogged toilet, and not the toilet tank as he had originally been told. As a result, Dickinson

changed the water classification from Category 1 to Category 2 to 3 and created an addendum to his original report, dated August 14, 2013. His new recommendation was that the carpet that was saturated be removed and discarded, mastic be scraped up and the cement flooring be thoroughly cleaned and disinfected. He included a revised floor plan with additional walls that needed to be removed as a result of the new classification. Dickinson was then commissioned to make a final determination of the mold moisture RH levels and air quality through bioaerosol sampling and surface sampling in Suites 101A and 101B. There was no observable mold growth detected and all compromised wall material had been removed and replaced. The report recommended that bioaerosols be collected when carpet installation was completed to determine if HEPA vacuuming or HEPA air filtration was needed to reduce dust spores. He testified this recommendation was ignored. Voss again contacted Dickinson in July of 2014 regarding a separate flooding incident in Suite 101D across the hall from 101A and B. While conducting a visual inspection, air sampling and moisture readings of 101D, Voss requested that Dickinson complete an assessment of 101A, B and C as well. Dickinson determined that based on his results there was no visual mold present and that the air quality in Suites 101A, B and C passed EPA guidelines.

Dickinson has met its burden on its motion of showing that it owed no duty to the plaintiff. Here, there is no dispute that Dickinson's contractual obligation did not rise to tort liability in favor of the plaintiff, a third party. *See, Espinal, supra*. Nor do the first two *Espinal* exceptions apply, as plaintiff argues in opposition. There is no evidence to support a finding concerning the first exception, that Dickinson launched a force of instrument of harm at plaintiff, because there is no proof in the record that it left the premises less safe. Nor is there evidence

that this defendant created an unreasonable risk of harm to others or increased that risk by leaving the premises in a more dangerous condition than it found it. *See, Castile v. Port Authority of NY*, 159 AD3d 792 (2d Dept. 2018). While plaintiff claims that Dickinson “downplayed” the dangers of the flood, this does not meet this exception. *See, Espinal, supra.*; *see also, Snitecki, supra.* Instead, the exception requires a finding that Dickinson affirmatively made the condition less safe, not that it failed to become an instrument for good. *See, Church ex rel Smith v. Calahan Industries*, 99 NY2d 104 (2002). The Dickinson reports show that the risks of water damage were assessed and detailed and that assessments and remediation recommendations were updated, detailed, charted and diagramed. The record shows that while Dickinson initially recommended certain materials be removed, and that when information changed from his client concerning the source of the water, he changed his assessment and re-categorized the water despite the fact that his own observations contradicted the new information. He also reassessed the dangers when the visible mold was evident and provided an additional assessment and recommendations to remediate the space. Thus, Dickinson addressed the changing information and conditions immediately. The conditions which plaintiff points to were not launched or exacerbated by Dickinson, but were already present.

The record is likewise clear that Dickinson did not create the flood or worsen the condition of the flooded premises. Dickinson provides an affidavit from Christopher Spicer, a Certified Industrial Hygienist. Spicer opines with a reasonable degree of scientific certainty that the general format and investigation used by Dickinson on August 7, 2013 and its assessment of the flood damage was consistent with professional guidelines in the industry, that the primary assessment of water damage and/or mold growth is a thorough visual inspection for signs of

water damage and visible mold growth supplemented by moisture monitoring, that Dickinson's August 9, 2013 report specifically stated a visual inspection was completed and that no visible mold growth was identified, that Dickinson also conducted moisture monitoring to support his visual inspection, that his report specifically and correctly identified the boundary of the impacted areas, that the addendum provided an updated floor plan indicating additional walls requiring removal due to the extended period of time that the walls remained wet contrary to his recommendations, that the report clearly stated Dickinson's limitations of inspection and that any visible mold growth encountered during removal of wet materials would need to be assessed as wall cavities were exposed. Spicer further opines that Dickinson correctly identified the source and nature of the flood based upon the information available. Thus Dickinson has shown that it did not launch a force or instrument of harm at plaintiff and there is no proof that it left the premises less safe or in a more dangerous condition than it found it. *See, Castile, supra.*

Dickinson has likewise shown with respect to the second *Espinal* exception that the record is void of any evidence that plaintiff detrimentally relied upon on Dickinson for continued performance, as plaintiff was unaware that Dickinson was on site. Plaintiff testified that he did not observe Dickinson there nor did he speak with him. The plaintiff cannot rely on a contract that he does not know about. *See, DeAngelis v. American Airlines*, 2010 WL 129349; *see also, Foster v. Herbert Slepoy Corp.*, 76 AD3d 210 (2d Dept. 2010). Plaintiff only became aware of Dickinson's involvement after a coworker presented a report to him. Plaintiff admitted that he did not fully understand what he was reading. Although plaintiff incorrectly argues that his knowledge was not required to meet this exception, he relies upon a case where the court found that plaintiff had no knowledge of the subject contracts, and ultimately found no detrimental

reliance. *See, Church v. Callahan Indus., Inc.*, 99 NY2d 104 (2002). Plaintiff's reliance on the Duford affidavit likewise fails to raise an issue of fact, as set forth in the Stanley Steemer discussion above. Plaintiff has not opposed Dickinson's argument that the third *Espinal* exception is inapplicable here. Inasmuch as Dickinson has established that it did not owe plaintiff a duty as a matter of law, the complaint against it is dismissed. Dickinson's motion for summary judgment on its cross-claim against St. Joseph's Medical, P.C. for contractual indemnification is therefore moot. Likewise, inasmuch as this Court has dismissed the complaint against Stanley Steemer, its cross-claims against Dickinson are moot.

III. SUMMARY JUDGMENT MOTIONS OF MEDICAL CENTER REALTY, LLC, 4000 MEDICAL CENTER DRIVE, LLC, NORTHEAST MEDICAL PROPERTIES, LLC; NORTH MEDICAL CENTER, P.C. d/b/a NORTHEAST FAMILY PHYSICIANS i/s/h/a NORTHEAST FAMILY PHYSICIANS, EAST MEDICAL CENTER, L.P. d/b/a NORTHEAST MEDICAL CENTER i/s/h/a NORTHEAST MEDICAL CENTER, NORTH MEDICAL, P.C., SUMMIT REALTY MANAGEMENT, INC. and A.J.M. MANAGEMENT SERVICES, INC. (hereinafter Medical Center Defendants)

These Medical Center defendants seek summary judgment on various respective grounds. The plaintiff has not opposed dismissal of the complaint against any of these defendants and that motion is therefore granted. The only opposition to these defendants' motions relates to the cross-claims concerning certain St. Joseph's defendants which have been opposed. As such, the issues remaining with respect to these defendants are: 1) Medical Center Realty's cross-claim for contractual indemnity against SJHCP and St. Joseph's Medical P.C.; 2) Medical Center Realty's cross-claim for failure to procure insurance against St. Joseph's and St. Joseph's Medical, P.C.; and 3) dismissal of the St. Joseph's defendants' cross-claims against Medical Center Realty,

4000 Medical Center Drive, Northeast Properties, North Medical East Medical and North Medical P.C.

The Board of Managers of Northeast Medical Center retained Summit Realty Management, Inc. (Summit) as the managing agent of the property pursuant to a Management Agreement. Under the terms Summit was responsible for the maintenance of the buildings, appurtenances and grounds as well as exterior cleaning of the property. Summit's duties under the agreement included collection the common area charges, paying utility bills and hiring snow removal. Summit was only responsible for the maintenance of the common areas such as elevators and stairways, as well as for the plumbing in the common areas only and not responsible for maintaining the plumbing or maintenance within the St. Joseph's suites.

The lease between Medical Center Realty and SJHCP contained the following indemnification provision:

Tenant does hereby indemnify landlord ... and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with the loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon or at the premises from or out of the occupancy or use by of tenant of the premises or any part thereof or occasioned wholly or in part by any act or omission by tenant ... In case landlord ... shall without fault on its part be made a party to any litigation commenced by or against tenant then tenant agrees to protect and hold landlord harmless and to pay all costs, expenses and reasonable attorney's fees incurred or paid by landlord in connection with such litigation. Tenant agrees also to pay all costs, expenses and reasonable attorney's fees that may be incurred or paid by landlord in enforcing the covenants and agreements in this lease.

Lease, Section 9.01(a)

It also contained an express insurance provision by which SJHCP agreed to procure insurance, including commercial general liability insurance, naming Medical Center Realty as an additional insured. *See, Lease section 10.01.* Pursuant to those terms, SJHCP was obligated to maintain

personal injury and property damage liability insurance against claims for personal injury, death or property damage occurring at those suites for at least \$3 million. *See, id.* The lease also specifically delineated Medical Center Realty's limited duties with respect to maintenance of the suites, providing that it "shall not be liable for any damage caused by water, rain, snow or ice or by breakage ... or leakage of water ... sewer, other pipes or conduits or arising from any other cause and upon, about or adjacent" to the suites. *Lease, section 11.02.* To the extent that SJHCP sought to make any alterations, additions or improvement to the suites in excess of \$50,000 the lease required prior written consent of Medical Center Realty. *See, Lease, section 4.04.* The lease obligated SJHCP at its own expense to keep the suites "including everything therein whatsoever in good order, condition and repair" during the lease. *Lease, section 8.01.* Medical Center Realty retained the "right but not duty to inspect the [suites] to determine whether [SJHCP] was in compliance with its obligations under the lease." *Id.* It however was explicitly released from any duty with respect to "damage caused by water ... leakage of water ... sewer or other pipes or conduits or arising from any cause in upon, about or adjacent to [the suites]." *Id at 8.02.* An assignment was executed on the same day, and provided that St. Joseph's Medical, P.C. agreed to assume all of the obligations under the lease. *See, Assignment, para. 3.* It further provided that "notwithstanding this assignment ... [SJHCP] remains liable for all of [its] obligations under the lease." *Id.* The lease identified A.J.M. Management Services, Inc. (A.J.M.) as Medical Center Realty's agent. On January 1, 2013, Summit replaced A.J.M. as Medical Center Realty's leasing agent for the suites pursuant to a Property Management Agreement. Robin Young, a Summit employee, testified that the tenant St. Joseph's Medical P.C. was

responsible for maintaining the toilets in the suite, as well as any incidents regarding a toilet overflow. Voss, a St. Joseph's Medical P.C. employee, testified consistently.

The motion for summary judgement of Medical Center Realty¹ on its cross-claims for contractual indemnity against SJHCP and St. Joseph's Medical, P.C., is granted. It has shown through the indemnification clause and assignment that St. Joseph's Medical, P.C. is not alleviated of its contractual duties to Medical Center Realty and that St. Joseph's Medical, P.C. likewise owes the same duties of defense and indemnification. A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement as well as the surrounding facts and circumstances, as is the case here. *See, Drzewinski v. Atlantic Scaffold & Ladder Co.*, 709 NY2d 774 (1987). A court should determine the intent of the parties from the language of the agreement. *See, Greenfield v. Philles Records*, 98 NY2d 562 (2012). The St. Joseph's defendants have failed to establish that issues of fact exist concerning their role in the overflow remediation and that those issues of fact preclude an award of contractual indemnity. They erroneously contend that the motion is premature. They are correct in their assertion that a party seeking contractual indemnification must prove itself free from negligence because it cannot be indemnified if its negligence contributed to the accident. *See, Bleich v. Metropolitan Management, LLC*, 132 AD3d 993 (2d Dept. 2015). Absent a showing that the indemnities are free from negligence, the claim for contractual indemnification is premature. *See, Harnden v. Lentzos*, 169 AD3d 1228 (3rd Dept. 1990). However, no issue of fact remains as to Medical Center Realty's liability to plaintiff inasmuch as plaintiff has not opposed its motion for

¹ The same motions by Summit and A.J.M. are granted as unopposed.

dismissal of the complaint. Although the St. Joseph's defendants argue that Medical Center Realty's motion for contractual indemnity should be denied on the basis that it had not met the conditions of the indemnity clause of the lease and it must establish that the suit was commenced "without fault on [Medical Center Realty's] part," that clause does not impose that burden on Medical Center Realty. Its right to indemnification and the respective obligations of SJHCP and St. Joseph's Medical, P.C. to provide such protection are delineated in the lease and assignment.

The Court does not need to determine any underlying facts with respect to this branch of the motion as the two parts of the indemnity provision are clear. The first part triggers indemnity for any "claims, actions, damages, liability and expenses ... and/or ... arising from or out of any occurrence in, upon or at the [suites] ...", while the second part of the indemnity clause applies only to litigation and does not state it operates to minimize the broader clause. Even if it does apply, Medical Center Realty has established that it was made party to the lawsuit without fault on its own part as evidenced by plaintiff's lack of opposition to dismissal in the case. The St. Joseph's defendants' arguments that the motion is premature, is likewise incorrect as the grounds have not been met pursuant to CPLR section 3212(f), requiring facts essential to oppose the motion are in the movant's exclusive knowledge and possession and could be obtained through discovery. *See, CPLR 3212(f)*. Based upon the foregoing, Medical Center Realty's motion for summary judgment on its cross-claim for contractual indemnity is granted. These parties are directed to attempt to stipulate to the amount of damages owed. If that has not occurred within thirty (30) days of the date of this Order, this Court will schedule a hearing.

Medical Center Realty's motion for summary judgment on its cross-claim for breach of contract for failure to procure insurance against the St. Joseph's defendants is likewise granted.

The lease provides:

At all times during the term of this lease tenant shall at its sole cost and expense maintain personal injury and property damage liability insurance naming the landlord as an additional named insured party against claims for the personal injury, death or property damage occurring on, in or about the premises during the term of this lease of not less than three million dollars with respect to personal injury, death or property damage and including contractual liability coverage. In the event that tenant shall not have delivered to landlord a policy or certificate evidencing such insurance fifteen days prior to the term commencement date and fifteen days prior to the expiration dates of each expiring policy landlord may obtain such insurance as it may reasonably require to protect its interest and the cost for such policy shall be paid by tenant to landlord as additional rent upon demand plus 12% administrative charge.

Lease, Section 9.01.

The law is well settled that agreements to purchase and maintain insurance are valid and enforceable. *See, Darowski v. High Meadow Co Op.*, 239 AD2d 541 (2d Dept. 1997). Such an agreement specifically anticipates the promisee's continued responsibility for its own negligence for which the promissor is obligated to furnish insurance. *See, Kinney v. Lisk Co.*, 76 NY2d 215 (1990). Where a party fails to comply with a contractual obligation to procure insurance, the party to whom the insurance was to be provided is entitled to recover expenses resulting from the breach. *See, Lerer v. City of New York*, 301 AD2d 577 (2d Dept. 2003). That requirement in the lease unequivocally established SJHCP's contractual obligation to procure insurance, naming Medical Center Realty as additional insured. Upon execution of the assignment, St. Joseph's Medical, P.C. agreed to "assume all of [SJHCP's] obligations under the lease" as St. Joseph's Medical, P.C. assumed all obligations and duties in the lease, including the insurance requirement. The assignment specifically provided that SJHCP remained liable for all obligations. The record shows that despite this obligation these defendants breached the duty. The relevant insurance policies, show that Medical Center Realty is not named as an additional

insured. Medical Center Realty through its insurance carrier first sought defense and indemnification by letter dated September 5, 2015 and three follow up tender letters were sent. When one sophisticated commercial entity agrees to indemnify another through the employment of insurance the agreement is enforceable. *See, Kinney, supra*. Thus, the insurance requirement of the lease unequivocally establishes that SJHCP had a contractual obligation to procure insurance naming Medical Center Realty as an additional insured and the assignment of the lease did not alleviate SJHCP of its contractual duties to Medical Center Realty. Instead, it means that its assignee, St. Joseph's Medical, P.C., owed the same duties of defense, indemnity and insurance to Medical Center Realty and the record is clear that both St. Joseph's defendants breached the duty to procure insurance for the benefit of Medical Center Realty. This motion is therefore granted.

Finally, the motion for summary judgment dismissal of the St. Joseph's defendants' cross-claims against Medical Center Realty, 4000 Medical Center Drive, Northeast Medical Properties, North Medical Center, East Medical and North Medical, P.C. is likewise granted. These defendants have established that there is no issue of fact and that the St. Joseph's defendants' cross-claims against 4000 Medical Center Drive, North Medical, East Medical Center and North Medical P.C. should be dismissed based on lack of merit. Although all of the parties have acknowledged that the complaints and cross-claims should be dismissed against these defendants, the St. Joseph's defendants have maintained contribution and indemnity cross-claims. There is no dispute that: 4000 Medical Center Drive was a condominium owner within the property but it had no ownership, leasing or management responsibility for the St. Joseph's suites where plaintiff alleges his exposure occurred, that Northeast Medical, P.C. is an inactive

entity that never owned any assets at the property and did not have any relationship to the St. Joseph's suites and that North Medical Center is the name of another building located in Liverpool, New York, 17 miles from the property. Nor is there any dispute that East Medical Center was involved in building the property but did not own or manage any part of the property in 2013. North Medical P.C. was a predecessor to St. Joseph's Medical which sold its assets effective January 1, 2011. The St. Joseph's defendants have offered no facts or legal arguments regarding these defendants, but only generally refer to them in opposition to Medical Center Realty's motion. A claim for common law contribution cannot be maintained in the absence of tort liability. *See, Board of Education of Hudson City School District v. Sergeant, Webster, Crenshaw & Folley*, 71 NY2d 21 (1987). Thus, the St. Joseph's defendants' contribution cross-claim is dismissed as there is no evidence of tort liability. Likewise, the cross-claim for common law indemnification is dismissed because there is no relationship between the St. Joseph's defendants and 4000 Medical Center Drive, Northeast, North Medical, East Medical or North Medical P.C. that creates a duty to indemnify. The key element of a common law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather a separate duty owed the indemnitee by the indemnitor. *See, Racket v. Braun*, 90 NY2d 1777 (1977). The absence of a relationship creating a duty to indemnify is fatal to a common law indemnification claim. *See, Smith v. Hooker Chemical & Plastics Corp.*, 83 AD2d 199 (4th Dept. 1981). Those motions are therefore granted.

IV. MOTIONS OF ST. JOSEPH'S MEDICAL, P.C., ST. JOSEPH'S HOSPITAL HEALTH CENTER, ST. JOSEPH'S PHYSICIAN HEALTH, P.C., ST. JOSEPH'S HEALTH CENTER PROPERTIES, INC. and ST. JOSEPH'S PHYSICIANS

Plaintiff has voluntarily agreed to discontinue against St. Joseph's Medical P.C., St. Joseph's Physicians, St. Joseph's Physician Health P.C. and St. Joseph's Health Center Properties. Therefore plaintiff opposes only the motion of defendant St. Joseph's Hospital Health Center (the Hospital).

The Hospital moves for summary judgment dismissal on the grounds that no liability attaches it for allowing its employee, John Wells, assisting in the remediation and argues that it owed no duty to the plaintiff. Plaintiff alleges that Hospital employees were "almost fully responsible for all remediation efforts" (*Plaintiff's Memorandum of Law*, 8/2/19 at 4.). Plaintiff is correct that where one "voluntarily assumes the performance of a duty, he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do..." *VanHove v. Baker Commodities, Inc.*, 288 AD2d 927 (4th Dept. 2001). In addition, a defendant who voluntarily assumes a duty may be held liable for breach of that duty if the plaintiff relied upon that defendant's undertaking and if that act or failure to do so placed the plaintiff in a more vulnerable position than if the duty had not been assumed. *See, VanHove, supra; see also, Arab v. Rouse Company of NY, LLC*, 90 AD3d 680 (2d Dept. 2011); *see also, Heard v. City of New York*, 82 NY2d 66 (1993). "The query is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm or has stopped where inaction is at most a refusal to become an instrument for good." *Van Hove, quoting, HR Moch Co v. Rensselaer Water Co.*, 247 NY 160 (1928).

Despite plaintiff's claims, there is no evidence in the record that he in any way relied upon Wells' actions or that Wells' actions or failure to act placed the plaintiff in a more vulnerable position. The record shows that Derrick Murray, Chief Operating Officer of St. Joseph's Medical P.C., contacted the Hospital when he learned of the leak and water damage. Mr. Scicchitano, the Vice President of the Hospital's Facilities Maintenance Department, directed Murray to contact Kevin Flegal, Director of Facilities and Maintenance Department, who in turn asked John Wells, a Hospital employee to assist. Wells did not arrive at the scene until Stanley Steemer, which had been retained by plaintiff's employer St. Joseph's Medical P.C., was already present. There is nothing in the record to support plaintiff's allegation concerning Wells' or any other Hospital employee's direction and control over the remediation process. Nor is there any evidence that Wells had any role in identifying mold, deciding which areas need to be cordoned off or deciding how or for how long the area should be dried out. Nor did Wells or the Hospital have any role in retaining Dickinson, who was retained by St. Joseph's Medical, P.C. The record is likewise devoid of any proof that Wells had any role or input in the extraction of water, placement of air dryers and scrubbers, assessment of the damages, or performance of air quality testing. Plaintiff vaguely asserts that Wells provided his expertise with no specific actions identified. Nor does the general allegation that Wells reported updates to Voss, a St. Joseph's Medical P.C. employee, provide any specificity. Instead, the submissions support the Hospital's contention that Wells provided assistance to Voss and that the Hospital's role was limited to assisting plaintiff's employer, St. Joseph's Medical, P.C. In addition, despite plaintiff's contentions that the Hospital failed to timely install plastic barriers, the record shows that it was St. Joseph's Medical, P.C. that retained both Stanley Steemer and Dickinson, the

entities that were responsible for such recommendations. Plaintiff, however, cannot maintain a cause of action against his employer in this Court pursuant to the Workers Compensation Law. None of the aforementioned conduct by the Hospital placed the plaintiff in a more vulnerable position, nor can this Court conclude that Wells advanced to such a point as to have launched a force or instrument of harm. *See, Van Hove, supra*. Inasmuch as plaintiff's claims in opposition are vague and unsupported by a thorough review of the record, they provide no basis for a finding of a duty on the part of the Hospital. As such, the Hospital's motion for summary judgment dismissal of the complaint on the ground that it had no duty is granted.

IV. CAUSATION

All of the defendants alternatively moved for summary judgment dismissal of the complaint on the ground that the plaintiff's alleged injuries were not caused by exposure to mold. Even if this Court were to find that any of these defendants owed a duty to the plaintiff, the plaintiff's case would be dismissed based upon the failure to establish an issue of fact as to the issue of causation. The law is well settled that a plaintiff claiming injuries from exposure to mold and other toxins must prove first and foremost he was actually exposed to the alleged mold and must prove both general causation and specific causation. *See, Cornell v. 360 West Street Realty, LLC*, 22 NY3d 762 (2014). The term "general causation" means that the mold to which plaintiff was allegedly exposed is capable of causing the alleged injuries, whereas "specific causation" means that plaintiff was exposed to sufficient levels of mold to cause the injuries. *See, Colucci v. Stivesant Plaza, Inc.*, 157 AD3d 1095 (3rd Dept. 2018). Therefore, in a mold exposure case, an expert opinion on causation is inadmissible if it fails to set forth plaintiff's

exposure to a toxin that is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation). *See, Parker v. Mobil Oil Corp.*, 7 NY3d 434 (2006). Not only must a causation expert establish that plaintiff was exposed to sufficient levels of a toxin to have caused his injuries, the expert must also do so through methods found to be generally accepted as reliable in the scientific community. *See, Shawn R. Exel Deborah R. v. BMW of North America, LLC*, 26 NY3d 801 (2016). A defendant moving for summary judgment on the issue of causation and mold exposure cases must show through expert evidence based on scientifically reliable methodology that there was no causal link between plaintiff's alleged injuries and the exposure to mold. *See, Cabral v. 570 West Realty, LLC*, 73 AD3d 674 (2d Dept. 2010).

Each of the defendants have met their burden through the submission of various thorough affidavits of experts who reviewed and assessed all of the plaintiff's medical records. Toxicologist William Sawyer, M.D. analyzed each of plaintiff's medical treatments beginning several years prior to the flood up to the present and concluded there was no objective medical evidence of a causal relationship between exposure to mold and exacerbation of his symptoms. He opined with a reasonable toxicological certainty that plaintiff was not exposed to mold spores beyond that of normal biflora and that his symptoms were the product of the natural progression of his chronic pre-existing conditions rather than exposure to mold. Mark Utell, M.D., performed an Independent Medical Examination on the plaintiff and concluded within a reasonable degree of medical certainty that plaintiff was never exposed to mold at the medical center as the result of the flood in 2013 or any time thereafter. He concluded that in the event plaintiff was exposed, his symptoms were not causally related because he was not exposed to

sufficient levels and his symptomology was consistent with the progression of a preexisting chronic condition and inconsistent with expected symptomology for mold exposure. Allergist Dr. Michael Katlan, M.D. conducted a comprehensive review and concluded plaintiff's conditions were not the result of mold exposure but rather a natural progression of his preexisting chronic diseases. He opined to a reasonable degree of medical certainty that plaintiff's sinus symptoms following the flood were consistent with preexisting chronic sinus disease. Dr. S. Michael Phillips, M.D. opined that the initial mold measurements taken on August 7, 2013 suggested no specific mold exposure and that the levels of potentially toxic mold were universally low and in general higher outdoors than indoors. He noted that repeat measurement of levels were performed during the August 14, 2013 rededications and those determinations continued to show that the outdoor mold levels were high, indoor levels were low, levels of potentially toxic molds were similarly very low, lower than outside. Phillips opined there was no evidence of mold induced disease on physical examination or by x-rays of his chest and sinuses. He concluded that none of the criteria for a causal relationship were established, that the medical records did not support plaintiff's mold allegations based on repeated physical findings and the absence of laboratory confirmation, that there was no relationship between the clinical illness experienced by plaintiff and exposure to mold or other toxins and that there was no evidence to conclude that plaintiff's medical problems were related to exposure to mold or toxic exposures, specifically in the subject suite.

For plaintiff to raise an issue of fact, he must show through scientific opinion and accepted methodology that the amount of mold exposure is known to cause the kind of harm that plaintiff claims to have suffered. *See, Parker, supra; see also, Shawn R., supra.* Plaintiff's

expert, Dr. Dahlgren, in his affidavit in opposition to dismissal, fails to offer a comparative analysis of the extent of the dampness and lengths of the exposure to toxic mold in the studies he cites and the dampness and length of plaintiff's exposure to support his conclusion that plaintiff's case is analogous to the cases he references. While the Dahlgren affidavit shows an association to his declining lung condition with mold exposure, there is no specific causation alleged. There are no chest x-rays, CT scans, positive antigen or IgE levels consistent with patients suffering from mold related diseases. "Where an expert employs differential diagnosis to rule out other potential causes for the injury at issue, he must rule in the suspected cause, and do so using scientifically valid methodology." *Cornell, supra*. Dr. Dahlgren fails to eliminate the plaintiff's preexisting condition as a cause and a reason other than to assert inaccurately that his condition was well under control. Furthermore, there are no scientific tests referenced that validate an infection of toxic mold suffered by the plaintiff at the suite in question. In addition, plaintiff has failed to raise an issue of fact as to whether his alleged asthma and sinus exacerbation and development of hypersensitivity pneumonitis was caused by exposure to mold. Dahlgren's reliance on those diagnoses is flawed as he downplays plaintiff's lengthy history of chronic asthma and sinusitis and misstates that plaintiff was ever diagnosed with hypersensitivity pneumonitis. Dahlgren's opinions were not based on any objective testing or methodology generally accepted in the field of toxicology. In fact, Dahlgren never represents in his affidavit that his analysis and contentions are based upon theories and or methodology that is generally accepted in the scientific community or more specifically in the field of toxicology as it relates to mold. Nor does he claim that the articles he cites have general acceptance in the scientific or medical communities. Neither Dahlgren's assessment or the opinions of other doctors such as

Dr. Evans, upon which plaintiff relies, are based on generally accepted methodology in the field of toxicology or supported by any objective testing. Thus, without the showing of objective testing, plaintiff has failed to allege causation but has only established an association of elevated levels of toxins. Therefore, plaintiff's submissions on the issue of causation fail to set forth plaintiff's exposure to a toxin that the toxin is capable of causing the particular illness he alleges and that plaintiff was exposed to sufficient levels of the toxin to cause his illness. *See, Parker, supra.*

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the motions for summary judgment dismissal of the complaint and dismissal of all cross-claims against defendants EST Trish, LLC d/b/a Stanley Steemer of Syracuse and Stanley Steemer International, Inc. are granted, and it is further

ORDERED, that the motion for summary judgment dismissal of the complaint against defendant Dickinson Environmental Consulting, LLC is granted. Its motion for summary judgment on its cross-claim against St. Joseph's Medical, P.C. for contractual indemnification and Stanley Steemer's cross-claims against Dickinson are denied as moot, and it is further

ORDERED, that the motions for summary judgment dismissal of the complaint as against defendants Medical Center Realty, LLC, 4000 Medical Center Drive, LLC, Northeast Medical Properties, LLC, Northeast Medical Center, P.C. d/b/a Northeast Family Physicians i/s/h/a, Northeast Family Physicians, East Medical Center, L.P. d/b/a Northeast Medical Center i/s/h/a Northeast Medical Center, North Medical, P.C., Summit Realty Management, Inc. and A.J.M. Management Services, Inc. is granted, and it is further

ORDERED, that the motion of Medical Center Realty, LLC, Summit Realty Management, Inc. and A.J.M. Management, Inc. for summary judgment on the cross-claims for contractual indemnity against defendants St. Joseph’s Health Center Properties, Inc. and St. Joseph’s Medical, P.C. is granted, and it is further

ORDERED, that the motion for summary judgment of Medical Center Realty, LLC on its cross-claim for breach of contract failure to procure insurance against defendants St. Joseph’s Health Center Properties, Inc. and St. Joseph’s Medical P.C. is granted, and it is further

ORDERED, that the motion for summary judgment of Medical Center Realty, 4000 Medical Center Drive, Northeast Medical Properties, North Medical Center, East Medical and North Medical, P.C. for dismissal of the St. Joseph’s defendants’ cross-claims against them is granted.


ORDERED, that the motion for summary judgment dismissal of the complaint as against defendants of St. Joseph’s Medical, P.C., St. Joseph’s Hospital Health Center, St. Joseph’s Physician Health, P.C., St. Joseph’s Physicians and St. Joseph’s Health Center Properties, Inc. is granted, and it is further

ORDERED, that any motions not specifically granted herein are deemed denied, and it is further

ORDERED, that all cross-claims not specifically addressed herein are dismissed.

**Dated: September 4, 2019
Syracuse, New York**

ENTER


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Notice of Motion of St. Joseph's Defendants' for Summary Judgment, dated June 11, 2019.
2. Affirmation of Catherine A. Gale, Esq., dated June 11, 2019, and attached exhibits.
3. Global Exhibits.
4. Notice of Motion of Defendant Dickinson for Summary Judgment, dated June 11, 2019.
5. Affirmation of Maria Mastriano, Esq., dated June 11, 2019, and attached exhibits.
6. Memorandum of Law of Defendant Dickinson, dated June 11, 2019.
7. Notice of Motion of Medical Center Defendants' for Summary Judgment, dated June 11, 2019.
8. Affirmation of Matthew J. Larkin, Esq., dated June 11, 2019, and attached exhibits.
9. Affirmation of Mark J. Utell, M.D., dated June 10, 2019, and attached exhibits.
10. Affirmation of Michael G. Katlan, M.D., dated June 10, 2019, and attached exhibit.
11. Affidavit of William R. Sawyer, PhD, D-ADFE, D-ABFM, dated June 10, 2019, and attached exhibits.
12. Affidavit of Robin Young, dated June 11, 2019, and attached exhibits.
13. Affidavit of John D. Murphy, Jr., dated June 11, 2019, and attached exhibits.
14. Memorandum of Law of Medical Center Defendants, dated June 11, 2019.
15. Notice of Motion of Defendant Stanley Steemer, dated June 11, 2019.
16. Affirmation of Kristen M. Benson, Esq., dated June 11, 2019, and attached exhibits.
17. Memorandum of Law of Defendant Stanley Steemer, dated June 11, 2019.
18. Affidavit of William R. Sawyer, Ph.D., D-ADFE, D-ABMF dated June 10, 2019, and attached exhibits.
19. Affidavit of Mark J. Utell, M.D., dated June 10, 2019, and attached exhibits.

20. Affirmation of Michael J. Katlan, M.D., dated June 10, 2019, and attached exhibit.
21. Affidavit of Kevin J. Dausman, dated June 11, 2019, and attached exhibits.
22. Affidavit of Jeffrey R. Trisciani, dated June 7, 2019, and attached exhibits.
23. Affidavit of D. Ryan Jankowski, dated June 10, 2019, and attached exhibits.
24. Memorandum of Law of St. Joseph's Defendants', dated June 12, 2019.
25. Notice of Cross-Motion of Defendant Dickinson to Dismiss Cross-Claims, dated July 26, 2019.
26. Affirmation of Maria T. Mastriano, dated July 26, 2019, and attached exhibit.
27. Affirmation of Matthew J. Larkin, Esq., dated July 31, 2019, and attached exhibits.
28. Affirmation of Matthew J. Larkin, Esq., dated July 31, 2019, and attached exhibits.
29. Affirmation of Matthew J. Larkin, Esq., dated July 31, 2019, and attached exhibits.
30. Affirmation of Catherine A. Gale, Esq., dated August 2, 2019, and attached exhibits.
31. Memorandum of Law of St. Joseph Defendants, undated.
32. Affidavit of Joseph A. Dowell, dated July 24, 2019, and attached exhibits.
33. Affidavit of Sherri St. James, dated July 30, 2019, and attached exhibits.
34. Affidavit of James D. Dahlgren, M.D., dated August 2, 2019, and attached exhibits.
35. Affirmation of Maria T. Mastriano, dated August 2, 2019, and attached exhibits.
36. Memorandum of Law of Third Party Defendant Franco & Associates, L.P., undated.
37. Affirmation of Kristen M. Benson, Esq., dated August 2, 2019, and attached exhibits.
38. Affirmation of Maria Mastriano, Esq., dated August 2, 2019, and attached exhibits.
39. Memorandum of Law of Third-Party Defendant Franco & Associates L.P., undated.
40. Affirmation of Maria Mastriano, Esq., dated August 2, 2019.
41. Memorandum of Law of Third-Party Defendant Franco & Associates L.P., undated.

42. Plaintiffs Memorandum of Law, dated August 2, 2019.
43. Plaintiffs Memorandum of Law, dated August 2, 2019.
44. Affidavit of W. Robert Taylor, Esq., dated August 2, 2019, and attached exhibits.
45. Attorney Affidavit Executive Summary of W. Robert Taylor, Esq., dated August 5, 2019, and attached exhibits.
46. Plaintiff's Memorandum of Law, dated August 5, 2019.
47. Affidavit of DAVID G. DUFORD, Ed.D, CIH, CHMM, dated August 5, 2019, and attached exhibits.
48. Addendum to Affidavit of David G. Duford, EdD, GIH, CHMM, dated August 15, 2019.
49. Affirmation of Catherine A. Gale, Esq., dated August 20, 2019, and attached exhibits.
50. Reply Memorandum of Law of St. Joseph's Defendants', dated August 20, 2019.
51. Affirmation of Jeffrey D. Schulman, Esq., dated August 20, 2019, and attached exhibits.
52. Affirmation of Jeffrey D. Schulman, Esq., dated August 20, 2019, and attached exhibits.
53. Affirmation of Jeffrey D. Schulman, Esq., dated August 20, 2019, and attached exhibits.
54. Reply Affirmation of Matthew J. Larkin, Esq., dated August 20, 2019, and attached exhibits.
55. Reply Memorandum of Law of Medical Center Defendants', dated August 20, 2019.
56. Reply Attorney Affirmation of Kristen M. Benson, Esq., dated August 20, 2019.
57. Memorandum of Law of Defendants Stanley Steemer, dated August 20, 2019.
58. Reply Affidavit of William R. Sawyer, Ph.D., dated August 20, 2019.