

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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RAYMOND SANCHEZ, individually and as the
parent and natural guardian of ALEXIA
NIZHNY, a minor child,

Plaintiffs,

-against-

JERULEE CO.,

Defendant.

DECISION AND ORDER

Index No.: TS 300459/06

Papers considered
(1) Notice of Motion
and Affs, (2) Aff in
Opp and (3)Reply

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JENNIFER G. SCHECTER, J.:

Plaintiff Raymond Sanchez commenced this action, individually and on behalf of his daughter, Alexia Nizhny, seeking recovery of over \$30,000,000 for damages allegedly caused by Jerulee Co.'s negligent abatement of mold in two apartments (Strober Affirmation in Support [Supp], Ex E). Jerulee Co. (Jerulee) moves for summary judgment, urging that there were no hazardous mold conditions in the apartments that caused Mr. Sanchez or his daughter any injury. Jerulee's motion is granted.

Background

Jerulee is the owner and landlord of a Manhattan building in which Mr. Sanchez and his daughter have resided. Mr. Sanchez moved into apartment 6-F of the building in 1996 with his then-girlfriend Natalie Nizhny. After her January 2001 birth, their daughter, Alexia Nizhny, lived with them in the apartment. In January 2002, Mr. Sanchez moved into apartment 2-H while Alexia continued to reside in apartment 6-F with her

mother. Mr. Sanchez visited with his daughter in apartment 6-F and remained there overnight when Natalie Nizhny was not home (Supp, Ex G at 104).

In 2003, after he had already moved out of apartment 6-F, Mr. Sanchez noticed mold on the bathroom ceiling and complained to Jerulee's management (Supp, Ex G at 38:18-25, 39:1). A few months later management painted the bathroom (*id.* at 53-55).

Mr. Sanchez testified that he first noticed mold in apartment 2-H in 2004 (Supp, Ex H, at 86:13-14; Supp, Ex E at ¶ 28). Jerulee had the area painted in 2004, 2005 and 2006 after Mr. Sanchez complained (Supp, Ex H at 85:13-22). The mold would go away for a while and then appeared again after many months to a year (*id.* at 87).

Mr. Sanchez commenced this action against Jerulee in 2004. He alleges that as a result of Jerulee's failure to abate the mold in the apartments "Alexia Nizhny was caused to become sick, sore, lame and disabled, and was caused to incur medical expenses in the past and future, and suffered past and future pain and suffering, and suffered serious personal permanent injuries including asthma, allergies, . . . chronic upper respiratory infection . . . [and] presence of lead in blood" (Supp, Ex D, Plaintiff's Amended Verified Bill of Particulars at ¶ 6[b]).

Mr. Sanchez also alleges that as a result of Jerulee's failure to abate mold, his own injuries include: "chronic upper-respiratory infections, chronic topical fungal infections, cardiac arrhythmia, thyroid disorder, severe chronic headaches, numbness of hands, weakness of hand grasp, positive Tinel sign at left and right wrists, bilateral median nerve entrapment at left and right wrists, depression/anxiety, major depressive episode [and] avoidant personality disorder . . ." (Supp, Ex D, Plaintiff's Amended Verified Bill of Particulars at ¶ 6[a]).

Analysis

Jerulee moves for summary judgment dismissal on the grounds that there were no hazardous mold conditions in the apartments and there is no evidence that mold exposure caused any injury to Mr. Sanchez or his daughter.

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in

admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Alexia Nizhny

Jerulee met its heavy burden of establishing that Alexia Nizhny does not suffer from injuries as a result of exposure to mold in the apartments. In support of its motion, Jerulee submitted an affirmation from David J. Resnick, a licensed physician who is board certified by the American Academy of Allergy and Immunology (Supp, Ex U). After review of Ms. Nizhny's medical records, conducting an examination of her in 2009, and reviewing environmental testing performed at the apartments, Dr. Resnick opines "within a reasonable degree of medical certainty" that "Alexia Nizhny is not suffering from any illness associated with, or caused by exposure to mold in her apartments" (Supp, Ex U at ¶ 13). In his detailed affirmation, Dr. Resnick concludes, that "all would agree that Alexia's exposure to mold was normal compared to anyone else living in an apartment in New York City. Further, my testing of [her] and review of her medical records establish that she

has not, and does not suffer from any mold-related illness. Rather, her asthma, which is not caused by mold exposure, is most likely related to, and/or exacerbated by normal environmental factors There was never any elevated levels of airborne mold found that could possibly account for her development or recurrence of asthma" (Supp, Ex U at ¶¶ 11-12).

Despite the passage of several months between service of Jerulee's motion and its final submission, and despite the fact that this action is over a decade old, plaintiff failed to come forward with any expert medical proof that Alexia Nizhny suffers from any injury caused by mold in the apartments. Because plaintiff failed to establish the existence of any triable issues of fact, defendant's motion for summary judgment dismissal must be granted as to claims related to Alexia Nizhny.

Raymond Sanchez

Jerulee also met its burden of establishing entitlement to judgment as to claims related to Mr. Sanchez's alleged injuries. Jerulee relies on, among other things, an affirmation from Jack J. Adler, a licensed physician board-certified in Internal Medicine and Pulmonology. Dr. Adler concludes that "Mr. Sanchez does not, and never has, exhibited

signs or symptoms consistent with exposure to elevated fungal levels in his apartments" (Supp, Ex V [Adler Aff] at 3).

Based on review of Mr. Sanchez's medical records, a 2009 examination of Mr. Sanchez and review of environmental reports related to the apartments, Dr. Adler opines within a reasonable degree of medical certainty:

"In my examination of Mr. Sanchez, I found him to have a regular heart rate, normal breathing and no evidence of skin abnormality. I found no conditions that could possibly be considered to be fungal or mold-related. Further, the environmental reports show that any levels of mold detected in Mr. Sanchez's apartment would not be sufficient to cause the injuries or illnesses he claims. . . . There is no indication he was ever exposed to any levels of molds that would be considered sufficient to cause the adverse health effects he claims.

"I have reviewed the records of Dr. Nathaniel Schaefer, Dr. Lucy Sourial, Lenox Hill Hospital, Dr. Harry Benovitz and Dr. Jordan Scher with respect to their care and treatment of Raymond Sanchez. I do not see any evidence in any of their records that Mr. Sanchez ever suffered from any fungal-related illness. This was confirmed by my examination of Mr. Sanchez.

"I am fully familiar with the medical literature published in peer reviewed journals on the subject of illnesses caused or exacerbated by exposure to airborne mold. Any claims that mold exposure causes depression, hypothyroidism, numbness in the hands, weakness of hand grasp, irregular heartbeat, palpitations, dermatitis, difficulty sleeping or headaches is unsupported by any credible evidence in this case and the relevant medical literature." (Adler Aff at 2-3).

In response, Mr. Sanchez relies on an affirmation from Guillermo Seco, a physician licensed to practice Internal Medicine and mental health. Dr. Seco affirms "with a reasonable degree of medical certainty that Mr. Sanchez's respiratory illness and rashes, as discussed in [an] annexed letter, are the result of his exposure to mold pathogens (Affidavit in Opposition [Opp], Ex B [Seco Aff] at ¶ 3). In the annexed letter--the contents of which, Dr. Seco affirms to be true based on his physical examinations, treatment and evaluations of Mr. Sanchez since 2004 (Seco Aff at ¶ 2)--Dr. Seco sets forth that Mr. Sanchez was under his care for "chronic respiratory infections with topical rashes, autoimmune illness, pain, depression/anxiety, pesticide toxicity" (Opp, Ex B, Seco Letter). Dr. Seco states:

"My diagnosis, treatments and recommendations are based on my patient's history, pictures of living quarters, environmental analysis reports provided by patient, laboratory results and chronic illnesses produced over the years. A great portion of his mental health condition is due to his housing conditions that therapy sessions have revealed, and his respiratory illness and rashes are produced by his exposure to mold pathogens that have exacerbated or produced chronic conditions based on my experience/patient history. Additionally more tests are needed to rule out exposure to pesticides and its medical consequences.

"As a practitioner in internal medicine and mental health, and not a certified specialist in environmental medicine, I therefore base my diagnosis on my fifty years of medical experience. I am willing to certify to the best of my knowledge

that mold pathogens are a major factor/contributor to his medical/mental health condition" (Opp, Ex B, Seco Letter [emphasis added]).

Dr. Seco's submission is plainly insufficient to rebut Jerulee's showing. It is not a reliable expert opinion that establishes that mold in the apartments caused Mr. Sanchez's injuries. Dr. Seco's opinion--given to the "best of [his] knowledge" and based generally on his experience--is not founded on criteria generally accepted in the medical or scientific community and is insufficient to demonstrate a causal link between the mold in the apartments and the injuries alleged. Additionally, even if Dr. Seco's conclusion that Mr. Sanchez's injuries were caused by mold pathogens could be accepted, there is no proof whatsoever that he was exposed to sufficient levels of mold in the apartments to cause the unspecified respiratory illness, rashes and medical/mental health condition from which he suffers (see *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762 [2014]; see also *Parker v Mobil Oil Corp.*, 7 NY3d 434, 447-448 [2006]). Not once does Dr. Seco point to any findings in the environmental test reports that support a conclusion that mold in the apartments caused Mr. Sanchez any injury. Dr. Seco's conclusory and unfounded opinion that unidentified "mold pathogens" exacerbated or produced unspecified "chronic

conditions" is insufficient to show that there is a triable issue under the circumstances.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

Dated: January 2, 2015



HON. JENNIFER G. SCHECTER