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Court Dismisses Mold-Related Personal Injury Claims Against Coop

By Thomas V. Juneau, Jr. and Andrew P. Brucker

Mold-related personal injury claims have mushroomed in recent years, fueled in large part by the media and plaintiffs' lawyers who see mold as "the next asbestos." Many of these claims have been brought against cooperatives, condominiums and landlords by residents claiming that their health has been adversely affected by the presence of mold in their apartments. The science regarding causation is inconclusive, however, and New York courts have not weighed in on the matter until recently.

BACKGROUND

Molds are naturally occurring organisms that are present almost everywhere. While molds need both moisture and nutrients to grow, moisture is the primary factor that promotes indoor mold growth. Whenever there is a water leak in housing, there is the potential for a mold-related claim.

Mold-related claims have grown exponentially in recent years. In Texas, for example, the number of such claims increased by more than 1300% between 1999 and 2001, and mold-related claims cost Texas insurance companies approximately \$4 billion between 2000 and 2003. Texas, however, is not alone. Mold-related claims have proliferated throughout the United States, and there are more than 10,000 mold-related lawsuits currently pending in state courts across the country. In New York, mold-related claims tripled in 2002, and by 2003 New York ranked fourth nationwide in the number of mold-related claims, behind California, Texas and Florida.

A major contributing factor to the explosion of mold-related litigation was a study conducted by the United States Centers for Disease Control and Prevention (CDC) in the mid-1990s, which indicated an association between exposure to household fungi and the development of acute idiopathic pulmonary hemorrhage. CDC later repudiated the findings of the study, but by then "the juggernaut of media frenzy, tort lawyers, and newly-coined [mold] remediators was rolling too fast to be slowed by mere science" (U.S. Chamber Institute for Legal Reform, "The Growing Hazard of Mold Litigation").

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In June 2001, a Texas jury awarded a verdict for over \$32 million. The award did not include damages for personal injuries and was later reduced on appeal to \$4 million, but the case was widely publicized. It was also reported that there were multimillion-dollar mold claims by celebrities such as Ed McMahon, Erin Brockovich, Bianca Jagger (New York City apartment) and Michael Jordan. Suddenly, molds, which have played an important role in sustaining plant and animal life for millions of years by breaking down organic matter, were deemed "toxic" and referred to as "the silent killer" by the media and those seeking to profit by sensationalizing the issue.

The lack of scientific and medical studies establishing a causal link between the presence of mold in indoor residential environments and illness has not deterred plaintiffs and their lawyers. They merely ascribe plaintiff's nonspecific (*i.e.*, not disease specific) symptoms to ominous-sounding, pseudo-diagnostic categories, such as toxic mold syndrome, sick building syndrome, multiple chemical sensitivity and idiopathic environmental intolerance, and file their lawsuits nonetheless.

RECENT NEW YORK CASES *Fraser v. 301-52 Townhouse Corp.*

In *Fraser v. 301-52 Townhouse Corp.*, 13 Misc.3d 1217(A), 2006 N.Y. Slip Op. 51885(L), 2006 WL 2828595 (Sup. Ct. N.Y. Co. Sept. 27, 2006) (Komreich, J.), the Frasers alleged that water leaks had promoted the growth of mold in their Manhattan cooperative apartment, causing them to suffer various nonspecific symptoms (*e.g.*, allergy-type symptoms, cognitive deficits, loss of libido, infertility and fatigue). Based upon their alleged personal injuries, the Frasers sought millions of dollars in damages from the

Thomas V. Juneau, Jr., who litigated the *Frye* hearing in *Fraser*, is an associate at Schechter & Brucker, P.C., which represents the defendants in the case. **Andrew P. Brucker** is a principal of that firm.

cooperative corporation that owned the building in which their apartment was located (the "Cooperative"). The Frasers also asserted claims against the Cooperative for lost income, personal property damage and the diminution in the value of their apartment.

The Cooperative took the position that the Frasers' theory of causation was not generally accepted as reliable by the relevant scientific and medical communities, and filed a motion to preclude the Frasers' medical experts from testifying at trial. The court granted the motion to the extent of ordering a hearing under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding that a lie detector test had not gained sufficient standing and scientific recognition in the relevant scientific community to justify admitting expert testimony in connection therewith).

Frye, the applicable standard in New York for determining the admissibility of expert testimony at trial, stands for the proposition that an expert may testify regarding novel scientific principles, procedures or theories only if they have gained general acceptance in the relevant scientific community.

Prior to the commencement of the *Frye* hearing, the Frasers dropped their neurological and infertility claims. Consequently, the *Frye* hearing in *Fraser* focused primarily on the Frasers' alleged respiratory problems, rashes and fatigue.

During the ten-day *Frye* hearing, four doctors testified, and the court admitted into evidence hundreds of pages of scientific and medical papers, and several books. After a thorough review of the evidence, the court found that the Frasers had "failed to demonstrate that the community of allergists, immunologists, occupational and environmental health physicians and scientists accept their theory — that mold and/or damp indoor environments cause illness." Accordingly, the court dismissed all of the Frasers' mold-related personal injury claims with prejudice. The claims for property damage and diminution in the value of the Apartment were not subjects of the hearing or the court's ruling.

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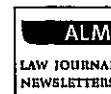
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Davis v. Henry Phipps Plaza South

Fraser was not the first ruling after a *Frye* hearing in a New York mold case. In 2001, in *Davis v. Henry Phipps Plaza South*, New York County Index No. 116331/1998, hundreds of apartment residents sued a building's owner for billions of dollars, alleging personal injuries, property damage and death from mold exposure. The Court in *Davis* conducted a *Frye* hearing limited to the issue of whether exposure to mold could cause neurological injuries (i.e., brain damage and/or cognitive impairment). In an unpublished ruling,

the Court found that exposure to mold in an "indoor environment has not gained general acceptance in the scientific community as a cause of brain injury, including cognitive impairment." Ultimately, the *Davis* case settled for \$1.17 million, a nominal sum in light of the number of plaintiffs.

'EVIDENCE'

The *Fraser* and *Davis* rulings demonstrate that the scientific and medical "evidence" of mold injury proponents will be carefully scrutinized. The *Fraser* decision, in particular, will have an immediate impact on other mold-related personal injury cases and undoubtedly will be relied upon by cooperatives, condominiums and landlords. See *Dole v. 106-108 West 87th*

Street Owners, Inc., 2006 N.Y. Slip Op. 52208(U) (Civ. Ct. N.Y. Co. Nov. 22, 2006) (Capella, J.) (denying petitioner's request for relocation expenses in the absence of expert testimony to establish a causal link between the mold condition and the alleged illness).

CONCLUSION

While encouraging to those defending mold-related personal injury claims, it should be noted that the *Fraser* and *Davis* rulings are from trial courts. Indeed, the Frasers have filed a Notice of Appeal. The Frasers have also filed a motion for reargument and renewal. Accordingly, *Fraser* will not be the last word on mold-related personal injury claims in New York.



COOPERATIVES & CONDOMINIUMS

CONDOMINIUM UNIT OWNERS MAY BRING DERIVATIVE ACTION

Caprer v. Nussbaum

NYLJ 10/24/06, p. 22, col. 1
AppDiv, Second Dept
(Opinion by Spolzino, J.)

Condominium unit owners brought an action, individually and derivatively on behalf of the condominium, against condominium board members, the condominium sponsor, the managing agent, and the condominium's accountant, alleging, among other claims, breach of fiduciary duty, breach of contract, fraud, and tortious interference with prospective economic advantage. Unit owners appealed from Supreme Court's grant of summary judgment to defendants on all claims other than a breach of contract claim against the sponsor and a breach of fiduciary duty claim against board members. The Appellate Division modified to restore many of unit owners' claims, holding that unit owners may bring a derivative action to protect their interests in the common elements of a condominium.

Sponsor converted the subject building to condominium ownership in 1987. Principals of the sponsor became members of the condominium board. Principals also own the corporations that have served as managing agents of the condominium since

conversion. Unit owners allege that the various defendants — the sponsor, the board members, the managing agent, and the corporation's accountant — committed acts of financial mismanagement, concealed financial records, failed to provide accurate records, failed to maintain the reserve fund, misappropriated funds, and engaged in self-dealing. Defendants, however, contended that unit owners lacked capacity to assert derivative claims, and lacked standing to assert many of the individual claims.

COMMENT

Tenants-in-common can bring unilateral actions against a fellow co-tenant to recover damages resulting from waste. See NY CLS RPAPL § 817 (2006). For example, in *Hoolihan v. Hoolihan*, 193 N.Y. 197, the court held that an aunt, who owned property as tenants in common with her nephew and other family members, could maintain an action for waste against the nephew, who had cut down trees on the property, without joining the other co-tenants in the action.

However, tenants-in-common cannot bring unilateral actions against third parties to recover damages but rather must join all tenants-in-common in the complaint. Thus, in *Eckerson v. Village of Haverstraw*, 6 App Div 102, 39 N.Y.S. 635, the court held that the trial court had properly

dismissed a co-tenant's complaint in a trespass action when plaintiff co-tenant had not joined all of the co-tenants in the action. The court held that the other co-tenants were necessary parties to the action. More recently, in *Vicario v. Raymond*, 44 A.D. 2d 863, the court dismissed a co-tenant's action seeking damages against a superintendent who continued to use a residence owned by three tenants-in-common. In dismissing the suit, the court reasoned that the resolution of the dispute could adversely affect the rights of the other tenants-in-common who were not parties to the action.

In *Caprer*, however, the court indicated that a tenant-in-common, even if barred from bringing a unilateral action against a third party, is entitled to bring a derivative action on behalf of other cotenants. Courts have permitted members of entities such as partnerships, trusts and limited liability companies ("LLC") to bring derivative actions against third parties to recover damages. The court in *Riviera Congress Associates v. Yassky*, 18 N.Y. 2d 540, held that limited partners were authorized to bring a derivative action to recover unpaid rent on behalf of the partnership when the general partners had wrongfully declined to sue for rent. Similarly, the court held in *Velez v.*

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