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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2482-07T1

GLORIA SMITH,

Plaintiff-Appellant,

v.

NORTHRIDGE AT EDISON, NORTHRIDGE
TENANTS CORP., JOSEPH BUETTEL,
SUSAN BUETTEL,

Defendants-Respondents.

Argued September 14, 2009 - Decided October 6, 2009

Before Judges Lisa and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4812-05.

Gary F. Piserchia argued the cause for appellant (Parker McCay P.A., attorneys; Mr. Piserchia, on the brief).

William J. Rada argued the cause for respondents Joseph Buettel and Susan Buettel (Methfessel & Werbel, attorneys; Mr. Rada, of counsel and on the brief).

Respondents Northridge at Edison, Northridge Tenants Corp. have not filed a brief.

PER CURIAM

Plaintiff, Gloria Smith, appeals from a summary judgment dismissing her personal injury complaint for a respiratory disorder allegedly caused by a mold condition in the basement

apartment she occupied. After initially granting the summary judgment motions of the owners of the condominium unit in which plaintiff was a tenant and the owner of the apartment complex and its tenants association, the judge considered plaintiff's reconsideration motion. The judge granted reconsideration but determined that the prior order was correctly entered and again granted summary judgment in favor of all defendants. Plaintiff appeals from that order as well.

The basis of the court's ruling was that plaintiff presented insufficient evidence from which a rational jury could find that the condition of the apartment was the cause of her respiratory disorder. In essence, the judge concluded that the opinion rendered by plaintiff's treating doctor on causation was a net opinion because he did not identify the specific nature of the mold spores or any other contaminant that was present in the apartment. Similarly, plaintiff's environmental expert did not test for specific spores when he inspected the apartment and did not identify any specific kind of mold or other contaminant present at the time plaintiff claims she became ill.

Plaintiff argues that the opinions rendered by her doctor were not net opinions and were sufficient to withstand summary

judgment on the issue of causation. We agree with plaintiff and reverse.[1]

Viewing the evidential materials in the motion record in the light most favorable to plaintiff, see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), these are the facts. On July 1, 2003, plaintiff became a tenant in Unit 139 of Building 13 of the Northridge Apartments in Edison. Unit 139 was owned by defendants Joseph and Susan Buettel. The buildings in this complex are three stories high. Unit 139 is a basement apartment, approximately three feet below grade. In September 2003, rainwater infiltrated the apartment above plaintiff's apartment and also entered the walls of plaintiff's apartment, causing the carpet in her hallway to become wet. The upstairs neighbor stated that water infiltration was an ongoing problem in the building. Plaintiff also observed water stains in other areas of the apartment, including the living room and bathroom. Sometime prior to plaintiff's occupancy, the sprinklers had

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[1] Only the owners of the condominium unit leased to plaintiff, Joseph Buettel and Susan Buettel, have responded to the appeal. In addition to arguing that the judge correctly granted summary judgment on the issue of medical causation, the Buettels also argue that, even if medical causation were sufficiently established to withstand summary judgment, they were nevertheless entitled to summary judgment because plaintiff's proofs were insufficient to establish liability against them. The trial court did not decide that issue. Accordingly, we will not decide it or address it. On remand, the Buettels may raise that issue.

apparently been activated, thus providing another source of water.

In January 2004, the pipes in the laundry room adjacent to plaintiff's apartment broke, causing extensive flooding in her unit. The Buettels arranged for removal of the carpet and installation of a new carpet within ten days of that incident. From time to time, plaintiff observed black mold in her bathroom. After removing it, it would return.

On October 13, 2004, about two weeks after plaintiff moved out of the apartment, Steven Temes, an industrial hygienist and certified microbial consultant, of AirWays Environmental Services, inspected the apartment and building. He identified other sources of water infiltration that had occurred in the past, caused by such things as the design and condition of the roof, the condition of the downspout in the vicinity of plaintiff's apartment, and the grading of the ground adjacent to her apartment. He observed that the French drain in the master bedroom had a mild odor of microbial volatile organic compounds (MVOCs), but the slab was not wet at the time of inspection as determined with the use of a moisture meter. Because the contaminated carpeting had previously been removed and replaced, and because the French drain was dry at the time of inspection, Temes concluded that "conditions at that time with regard to airborne microbial contamination would not have been

representative of the chronic exposures [plaintiff] received while living in the apartment when she became sensitized." Temes also observed a heavily rusted return register, indicating a condition of high indoor relative humidity for an extended period of time.

Among the findings and conclusions contained in Temes' report was the following:

> The condition of water/moisture in the open French drain as a result of foundation seepage and flooding of the laundry room which shares this same drain would certainly have produced bacterial and fungal growth. The characteristic and recognizable odor of MVOCs produced by fungal organisms (a musty, mildewy odor) was detected by AirWays in the October 13, 2004 site inspection. The drain and slab were determined to be dry at this time with the use of a moisture meter. Evidence of a previous moisture condition existing in this drain was clear and convincing. The open French drain was approximately 4 feet from where Ms. Smith's head would have rested on her pillow when she was sleeping. Because her most severe breathing difficulties occurred while she was sleeping, it is very likely that her exposure to the microbial contamination to which she became sensitized occurred in her bedroom. Additional known water damage to Apartment 139 included saturation of the carpeting in the rear hallway where the appearance of the carpet tackless strip was consistent with significant impact by water. The known water intrusion event in the rear hallway in September of 2003 may not have been the first occurrence from the roof leak based upon statements reportedly made by Ms. Smith's former upstairs neighbor. Evidence of a sewage leak running onto the floor of the electrical utility room adjoining Gloria

> Smith's bedroom was also observed. This may have permitted sewage contaminants to enter the common French drain.
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> Among the indoor bioaerosol contaminants known to be capable of producing sensitization in occupants are fungi (especially mold spores and fragments), bacterial endotoxins, MVOCs, and any other allergen or chemical irritant associated with microbial growth in water-damaged buildings. The potential to develop an environmental hypersensitivity, as with any allergy, is a function of genetic predisposition.

In July 2004, plaintiff began experiencing severe respiratory symptoms. The episodes occurred primarily through the night, while plaintiff was sleeping. She experienced serious problems breathing because her throat closed up. She saw her family physician on August 2, 2004, and was prescribed antibiotics. Although she took the antibiotics as prescribed, the symptoms continued, and indeed worsened. On August 12, or 13, plaintiff experienced a severe episode and went to the emergency room of a local hospital. Chest x-rays were performed. Plaintiff was given a nebulizer and additional antibiotics were prescribed. On August 24, 2004, late at night, plaintiff could hardly breathe. She drove herself to the emergency room. She was admitted overnight. She was prescribed intravenous antibiotics, and discharged with a prescription for more antibiotics, an inhaler and Albuterol. In the ensuing weeks, the symptoms continued and worsened.

Plaintiff decided to consult Dr. Rodolfo Ouano, a specialist in internal medicine. She made an appointment with him for September 28, 2004. The night before the scheduled visit, plaintiff awoke at about 2 or 3 o'clock in the morning, unable to breathe. She attempted to use the inhaler by her bed, but was unable to inhale the Albuterol. She panicked, started spraying the inhaler, and crawled outside into the air. She sat outside until about 8:00 a.m., noticing that her breathing improved.

Plaintiff went to her scheduled appointment with Dr. Ouano. In her history, she described the conditions in her apartment. She also described the events in the preceding months and the treatment she had received through her family physician and hospitals, as well as the results. As set forth in his August 4, 2005 report, Dr. Ouano stated that plaintiff described a cough productive of yellow expectorate, uncontrollable bouts of coughing, vomiting and inability to fall asleep. On physical examination, he found plaintiff to be diaphoretic. She also exhibited labored breathing. Examination of her chest revealed stridor, intercostal retraction, and diffuse pulmonary wheezing.

Dr. Ouano told plaintiff that because the episodes typically occurred in the middle of the night while she was sleeping, the source of the problem appeared to be something she was breathing at that time. Dr. Ouano advised plaintiff not to

go home and to immediately move out of the apartment, which she did. The doctor prescribed a tapering dose of oral steroid, an antibiotic, plus two types of inhalant bronchodilators.

Since vacating the apartment, plaintiff's symptoms have subsided, but not entirely. She has continued with the medication. According to Dr. Ouano, "she will have residual and permanent physical damage which will affect her during the balance of her lifetime." Plaintiff continued treating with Dr. Ouano for this condition. She apparently saw him a total of seventeen times as of the summary judgment proceedings.

In his report of August 4, 2005, Dr. Ouano did not clearly set forth his opinion that plaintiff's respiratory disorder was caused by the mold condition in her apartment. He stated: "The patient noted that her respiratory symptoms started in July, 200[4] when she resided in a dwelling which [was] subsequently noted to be contaminated with molds." When defendants moved for summary judgment and disputed the sufficiency of Dr. Ouano's report regarding causation, Dr. Ouano signed a certification dated July 9, 2007 which included the following: "At the time of my examinations of Ms[.] Smith, as expressed in my report, and presently, it is my medical opinion that her medical conditions and permanent physical damage were caused by the harmful conditions present in her residence." That

certification was filed in opposition to the summary judgment motions.

Further, plaintiff informed the court that defendants had scheduled a discovery deposition of Dr. Ouano, but canceled it. At such a proceeding, of course, counsel for the defense could explore in more detail the bases of the expert's opinions. Because defendants declined to conduct a discovery deposition, plaintiff arranged for a de bene esse deposition of Dr. Ouano, to preserve his testimony for trial and to provide more detail about his opinions.

When asked what plaintiff described in her history as what she believed caused her symptoms, Dr. Ouano said:

> I previously said that he -- she had a water problem in her residence. I previously described the color of the wall, the wetness in the carpeting. She also described seeing a French drain which was apparently clogged and had some growth, green -- greenish, green growth, or whatever, on it.

Dr. Ouano answered affirmatively when asked whether the respiratory symptoms were caused by the adverse environment in her apartment. As to the permanency of her injuries, he elaborated:

> I believe she was sensitized by whatever her allergins or whatever substance that she had inhaled. And I believe that she would have recurrence of her symptoms throughout her lifetime. And I also believe

> that she would need ongoing treatment throughout her life.
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> . . . .
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> Well, this would probably consist of bronchial dilators, of course steroids, antibiotics, medications.

In their moving papers, defendants criticized the absence of specificity in identifying the mold spores or other contaminants in plaintiff's apartment. To address this criticism, plaintiff's counsel asked Dr. Ouano whether he visited plaintiff's apartment to ascertain the cause of her problem. He answered in the negative. Counsel then asked how he ascertained the cause of her condition. Dr. Ouano responded:

> As a medical doctor I do not investigate. My job is to treat patients. I took the patient's history as being reliable. I noted the timing of her symptoms to what she had described as her living condition and on that basis I was impressed that the patient suffered injuries secondary to the environment that she was in.

Dr. Ouano further testified that all of the opinions he had rendered were given to a reasonable degree of medical certainty. Plaintiff furnished the court with the transcript of Dr. Ouano's deposition (or portions of it) in opposition to defendants' summary judgment motions and in support of plaintiff's reconsideration motion.

In the summary judgment proceedings, defendants argued that because Temes did not test for specific types of mold spores, and because Dr. Ouano did not conduct objective tests of plaintiff, his opinion on medical causation was insufficient to withstand summary judgment. Defendants did not support their argument with any opposing expert reports from physicians or environmentalists.

The judge agreed with defendants. Referring to two previous trials over which he had presided involving injuries caused by exposure to mold, the judge noted that "[s]ometimes there has been air sampling and sometimes there has not been air sampling. But in both cases, the medical testimony about the harm to the plaintiff was clear that the medical . . . condition suffered by the plaintiff was caused by exposure to mold." The judge concluded: "that there has not been a sufficient showing of proximate causation between the medical condition suffered by the plaintiff and the mold."

In ruling on plaintiff's reconsideration motion, the judge noted that although Temes detected an odor of mold and observed visible mold growth on sheetrock, "[w]e don't know the type [of] mold, we don't even know what it was, we know that it looked like mold." The judge concluded there was no way to tell if the mold that Mr. Temes smelled and saw was the type that would cause symptoms such as those experienced by plaintiff.

Accordingly, the judge adhered to his prior determination that the proofs on medical causation were insufficient to allow a rational jury to render a verdict in favor of plaintiff, and he again granted summary judgment for defendants.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In determining whether a material fact exists, a judge must determine whether

> the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2.
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> [Brill, supra, 142 N.J. at 540.]

Thus, "when the evidence is so one-sided that one party must prevail as a matter of law, . . . the trial court should not hesitate to grant summary judgment." Ibid. (internal quotation marks omitted). On appellate review, we apply the same standard and determine de novo whether, applying the Brill standard, summary judgment was properly granted. Prudential Prop. & Cas.

Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Experts may base their opinions on facts or data perceived by or made known to them. N.J.R.E. 703. Substantial relevant facts were made known to Dr. Ouano by plaintiff through her history. These included the condition of the apartment as observed by her over a period of months, a description of the nature, severity and timing of her respiratory episodes, medical intervention for those episodes, her response to treatment on those prior occasions, and the like. Dr. Ouano also made his own observations as a result of his clinical examination of plaintiff. He noted that her chest exhibited stridor, intercostal retraction and diffuse pulmonary wheezing. This undoubtedly corroborated symptoms described by plaintiff.

Based upon the history and clinical examination, utilizing his medical education, experience and expertise, Dr. Ouano made a diagnosis. At first, he advised plaintiff to immediately vacate the apartment. When she did, and continued treating with him in the ensuing months, she reported that her symptoms has subsided. This, no doubt, confirmed his preliminary opinion that the source of plaintiff's respiratory distress was her exposure to the environmental conditions in her apartment. While defendants speculate that the source could have been something else, such as new clothing or furniture, to which

plaintiff might have been allergic, this is nothing more than speculation and is not a fair reading of Dr. Ouano's opinions as set forth in his report, certification and de bene esse deposition testimony.

Of course, defendants are free to challenge Dr. Ouano's opinions, including his opinion on medical causation, through cross-examination. See N.J.R.E. 705 (providing that an expert may be required to disclose the underlying facts or data supporting his or her opinion on cross-examination); see also McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 172 (App. Div.) (commenting that when confronted with a net opinion, an adversary has the opportunity "by interrogatory and deposition to discover the basis for the expert's opinion"), certif. denied, 108 N.J. 219 (1987).

The net opinion rule precludes experts from expressing bare conclusions, unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). We are satisfied from our review of the record that Dr. Ouano's opinion on medical causation does not fall within the proscription. Any shortcoming such as those relied upon by defendants and the trial court, such as the lack of testing for specific types of mold spores, the absence of objective testing of plaintiff, or other possible sources of plaintiff's symptoms and respiratory disorder, go to the weight of Dr. Ouano's opinion, not its

admissibility. An expert's opinion, rendered to a reasonable degree of medical certainty, and based upon sufficient facts or data, "is not inadmissible merely because it fails to account for some particular condition or fact which the adversary considers relevant." State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988), certif. denied, 114 N.J. 525 (1989).

The orders under review are reversed and the matter is remanded for further proceedings.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION