

NEW YORK SUPREME COURT JUSTICE DISTINGUISHES ASSOCIATION FROM CAUSATION IN MOLD CASE

Eric J. Berger • 212.908.1279 • eberger@cozen.com
Laura Erb • 212.908.1215 • lerb@cozen.com

In a recent decision, *Cornell v. 360 West 51st St. Realty, LLC*, Index No. 113104/04, 2009 N.Y. Misc. LEXIS 3579 (Sup Ct, New York County Dec. 18, 2009), New York County Supreme Court Justice Marcy Friedman followed the rationale set forth by the Appellate Division, First Department in *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep't 2008) regarding the admissibility of scientific and medical evidence in personal injury mold cases.

In *Fraser*, former residents of a cooperative apartment building alleged that exposure to mold caused them to suffer personal injuries, including respiratory problems, rashes, and fatigue. The defendants moved to preclude the plaintiffs' medical experts from testifying at trial. New York County Supreme Court Justice Shirley Kornreich held a *Frye* hearing, and following the conclusion of testimony, found that the plaintiffs failed to demonstrate that their experts' opinions had gained general acceptance in the scientific community. Consequently, Justice Kornreich dismissed the plaintiffs' mold-related personal injury claims.

The First Department affirmed Justice Kornreich's decision, explaining, "[w]hile there is general agreement that indoor dampness and mold are 'associated' with upper respiratory complaints . . . the observed association between such conditions and such ailments is not strong enough to constitute evidence of a causal relationship." *Fraser, supra*. However, the majority stressed that the "holding does not set

forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here." *Id.*

The New York County Supreme Court addressed this issue again in *Cornell*. In *Cornell*, the plaintiff alleged that exposure to mold caused her to suffer personal injuries, including permanent upper respiratory illnesses, asthma, and skin irritations. Justice Friedman held a *Frye* hearing and found that the supplemental studies submitted by plaintiff's counsel did not remedy the deficiencies found by the *Fraser* majority. As a result, Justice Friedman dismissed the plaintiff's complaint.

The *Cornell* decision is good news for any defendant who may face a mold-related personal injury claim in the First Department. Note, however, that Justice Friedman recognized that "higher appellate review is awaited, given that this dispute arises in the context of widespread public concern and increasing litigation about the effects of mold on health." Therefore, it is imperative for potential defendants to keep an eye out for new developments in this area. In the meantime, defendants facing mold-related personal injury claims should focus on demonstrating that the scientific and medical evidence only supports an "association" between damp and moldy indoor environments and upper respiratory symptoms, which, under generally accepted principles of scientific analysis, is insufficient evidence of causation.