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Kendall v Amica Mut. Ins. Co.
2014 NY Slip Op 50943(U)
Decided on June 17, 2014
Supreme Court, Albany County
Teresi, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 17, 2014

Supreme Court, Albany County

Richard K. Kendall and HOLLY M. KENDALL, Plaintiffs,

against

Amica Mutual Insurance Company, Defendant.

RICHARD K. KENDALL and HOLLY M. KENDALL, Plaintiffs,

against

USA DECON; ROBERT DEMARET; DUCT AND VENT CLEANING OF AMERICA, INC.; COLONIAL CLEANERS LLC; and AMICA MUTUAL INSURANCE COMPANY, Defendants.

4363-11

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Joseph C. Teresi, J.

Plaintiffs commenced these two actions[FN1] to recover the damages they allegedly sustained by Defendants'[FN2] failure to properly remediate their home's CS tear gas contamination. Issue was joined by each Defendant, discovery has been conducted, is complete, and a note of issue was filed. A jury trial date certain has been set (November 10, 2014).

All parties now move for various relief.

In Action #1, Amica Mutual Insurance Company (hereinafter "Amica") moves to dismiss each of Plaintiffs' three causes of action. Plaintiffs did not oppose Amica's motion relative to their first (breach of contract) and third (declaratory judgment) causes of action. As unopposed, these portions of Amica's motion are granted and will not be further addressed. Plaintiffs did, however, challenge Amica's motion to dismiss their second (breach of good faith and fair dealing) cause of action and also moved to amend their complaint. On this record, Amica demonstrated its entitlement to dismissal of Action #1's second cause of action and Plaintiffs failed to establish their entitlement to amend their complaint.In Action #2, Robert Demaret (hereinafter "Demaret") moves for summary judgment dismissing the claims Plaintiffs asserted against him individually, with USA Decon also moving [*2]for summary judgment dismissing Plaintiffs' complaint. Duct and Vent Cleaning of America, Inc. (hereinafter "D & V Cleaning") and Amica similarly move for summary judgment dismissing Plaintiffs' complaint and, in addition, seek an order precluding Plaintiffs' experts from testifying at trial. Amica also moves for summary judgment dismissing the co-Defendants' cross-claims. Plaintiffs oppose Defendants'

motions and cross-move to amend their complaint and supplement their discovery responses. Defendants oppose Plaintiffs' cross-motion. Because Defendants demonstrated their entitlement to summary judgment on the issue of causation and Plaintiffs raised no triable issues of fact, Defendants' motions for summary judgment in Action #2 are granted. Such holding renders moot the balance of Defendants' motions and Plaintiffs' motion to supplement. In addition, Plaintiffs failed to establish their entitlement to amend their complaint.

Considering Defendants' summary judgment motions first, the "facts must be viewed in the light most favorable to the [Plaintiffs]." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011]). The Defendants bear the initial burden of "tender[ing] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]), "by proffering evidentiary proof in admissible form." (*DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326 [3d Dept 2010]; *Ulster County v CSI, Inc.*, 95 AD3d 1634 [3d Dept 2012]). Only if Defendants establish their right to judgment as a matter of law will the burden shift to Plaintiffs to establish, by admissible proof, the existence of genuine issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Zaslowsky v J.M. Dennis Const. Co. Corp.*, 26 AD3d 372 [2d Dept 2006]).

In toxic exposure cases, such as this one, it is well established that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin 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)." (*Cornell v 360 W. 51st St. Realty, LLC*, __NY3d__ [2014], quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]).

On this record, Defendants' joint expert, Jonathan Borak, MD (hereinafter "Borak")[FN3], demonstrated Defendants' entitlement to summary judgment. He first established the non-existence of specific causation proof relating to CS tear gas. He then demonstrated the lack of both general and specific causation proof relative to the cleaning products Defendants used to remediate Plaintiffs' home. Before examining Borak's analysis and conclusions, however, a recitation of this action's uncontested factual

background is necessary.

As explained by both Plaintiffs during their depositions, on April 5, 2009 their home was contaminated with CS tear gas. Plaintiffs were living at 535 Sand Creek Road, Colonie, New York, and had rented out its basement apartment. On that day, one of the tenants barricaded himself in the apartment, allegedly with a firearm. The Colonie Police Department removed the tenant by firing CS tear gas into the apartment.

After the tenant was removed and the police left, Plaintiffs returned home. Mr. Kendall recalled the basement apartment's "disarray." Ms. Kendall explained that it was "turned upside down." Ms. Kendall went into the basement apartment for only five to ten minutes and described [*3]how the exposure effected her: "My eyes were burning. My skin was burning. I couldn't stop coughing." Because of the severity of her reaction, she sought treatment at a nearby hospital. She was not admitted however, and left when her coughing decreased. Plaintiffs went back to their home that night and slept in their bedroom, two floors above the contaminated basement. When Ms. Kendall left her home the next morning she did not return to live there until October 2009. She only visited to facilitate its remediation.

Plaintiffs, working with Amica and its representative AEGIS Engineering Services, Inc., hired USA Decon to perform the tear gas remediation. According to USA Decon's president, Demaret, it started working at the Plaintiffs' home on May 30, 2009. Demaret explained that USA Decon used one product, named Get The Odor Out, to perform their cleaning work. In addition, they subcontracted the HVAC cleaning to D & V Cleaning. It used a product called Envirocon. D & V Cleaning's representative testified that they performed all of their work on Plaintiffs' residence in a single day, June 5, 2009, and have not returned to the residence since. USA Decon then completed their decontamination work on June 10, 2009, and have not "returned to the property after that date."

After the remediation contractors finished their work, on June 19, 2009 John Van Raalte (hereinafter "Van Raalte") tested the residence's air for CS tear gas contamination. He testified about his methods and procedures, explaining that he tested the air in three of the residence's rooms. He concluded that there was "no tear gas in the air on the day [he] visited, not at least by the scientific methods that are available." His report similarly states

that "the cleanup was thorough and the air in the residence is no longer contaminated by the effects of the CS tear gas and powder." Notwithstanding the report's conclusiveness, Van Raalte stated at his deposition that his testing's "scientific significance... [was] probably very little."

After further repairs and renovations were completed, Plaintiffs returned to their home in October 2009. Although Ms. Kendall testified that she began experiencing adverse health effects within one month of her return, Plaintiffs continued to reside in their home until March 5, 2010. Plaintiffs' Action #2 personal injury claims[FN4] are based wholly upon Ms. Kendall's alleged exposure during this period, October 2009 through March 5, 2010.

Soon after Plaintiffs left this second time they hired Needham Risk Management (hereinafter "Needham") to perform additional testing. Needham collected air and surface samples from the residence, and sent its samples to be analyzed by an outside laboratory. While the resultant report noted that no CS tear gas was detected, it also contained the disclaimer that "method is not validated."

Plaintiffs' home was then tested a third time, on November 17, 2010, by Michael Rowzee (hereinafter "Rowzee") of Certified Decontamination. Rowzee's report explained the sampling he conducted, which specifically sought to detect CS tear gas, volatile organic compounds, Methylene Chloride, and other compounds consistent with the decontamination of a building using chlorine dioxide/chlorite. In summarizing his CS tear gas finding, Rowzee stated: "[d]econtamination for o-chlorobenzylidene malononitrile (CS tear gas) was accomplished with the exception that residue may still be present in non-cleaned areas. The remaining residue, if [*4]any, is not affecting indoor air quality." Similarly, in testing for volatile organic compounds, Rowzee stated that "[n]one above an acceptable level were found." Without attaching the laboratory analysis of the samples he collected, Rowzee's report stated that "[c]ompounds consistent with the decontamination of a building using chlorine dioxide/chlorite were found.... [and] Methylene Chloride and similar compounds were found." His report did not name the "consistent with... decontamination" compounds or the compounds "similar" to Methylene Chloride that he allegedly found. Nor did he specify the unnamed compounds' concentrations.

This record contains no proof that any additional chemical testing or sampling of Plaintiffs' home was conducted.

With this background, Borak reviewed Plaintiffs' medical records and bill of particulars to identify the specific adverse health effects that underlie Ms. Kendall's personal injury claims. He identified the following conditions, as specified by Plaintiffs' bill of particulars: "Reactive Airways Dysfunction Syndrome (RADS), Irritant Induced Asthma (IIA), bronchitis, recurrent hemorrhagic cystitis, hematuria, eczamatoid rashes, dermatitis, and other non-specific skin rashes and an interrupted menstrual cycle."

Borak first established that there is no specific causation link between Ms. Kendall's RADS, IIA, and bronchitis conditions and post-remediation CS tear gas exposure. Borak specifically reviewed Van Raalte, Needham, and Rowzee's chemical testing/sampling, and offered sufficient foundational allegations to properly rely on each. (*Greene v Robarge*, 104 AD3d 1073 [3d Dept 2013]; *Hinlicky v Dreyfuss*, 6 NY3d 636 [2006]; *O'Brien v Mbugua*, 49 AD3d 937 [3d Dept 2008]). From their reports and testimony, he determined that "[t]he evidence indicates that the Kendall house was successfully remediated for CS tear gas by June 11, 2009, and there is no evidence that Mrs. Kendall was exposed thereafter to CS tear gas." For Borak, the scientific proof demonstrated that Ms. Kendall's pulmonary conditions were caused by her acute April 2009 CS tear gas exposure. Not from exposure to CS tear gas that remained in the home following Defendants' remediation work. Because Ms. Kendall's personal injury claim is based solely upon her post-remediation exposure to CS tear gas, Borak's above finding breaks the specific causation link between Defendants and Ms. Kendall's RADS, IIA, and bronchitis conditions.

Moreover, Borak attributed Ms. Kendall's asthmatic symptoms to her preexisting allergic asthma condition, which was documented in her medical history and confirmed by a pulminory function test.[FN5] He also discussed why Ms. Kendall's methacholine challenge test's "borderline" finding was invalid. Lastly, Borak bolsters his RADS conclusion by specifically citing published reports that described other patients whose underlying respiratory conditions were exacerbated by acute CS tear gas exposure.

Borak similarly found that there is no specific causal link between Ms. Kendall's eczamatoid rashes, dermatitis, non-specific skin rashes, recurrent hemorrhagic cystitis, [*5]hematuria, and interrupted menstrual cycle conditions[FN6] and her alleged post-remediation CS tear gas exposure. Again, reviewing the scientific testing that has been conducted in this action, Borak determined that "there is no evidence that Mrs. Kendall was exposed... to CS tear gas" after the Defendants' remediation was complete. He attributes Ms. Kendall's skin disease claims instead to her pre-existing eczema and atopic dermatitis. He likewise attributed Ms. Kendall's recurrent hemorrhagic cystitis, hematuria, and interrupted menstrual cycle[FN7] claims to pre-existing conditions. He noted that Ms. Kendall's medical records establish a history of eczema and atopic dermatitis, urinary tract infections, and menstrual irregularities long pre-dating April 2009, which explain her current conditions.

To summarize, Borak's affidavit and report amply demonstrate that Ms. Kendall was not exposed to a sufficient levels of CS tear gas, during the post remediation period between October 2009 and March 5, 2010, to cause the medical conditions that underlie her claimed injuries. As such, Defendants demonstrated their entitlement to summary judgment of Plaintiffs' CS tear gas exposure claims by establishing the lack of specific causation, and successfully shifted the burden of proof on this issue.

Defendants similarly established a lack of both specific causation and general causation proof relative to Ms. Kendall's alleged exposure to the cleaning chemicals Defendants used.

With Borak's affidavit and report, Defendants first demonstrated that Plaintiffs have no proof of a specific causation link between the cleaning products Defendants used and Ms. Kendall's injuries. Borak reviewed the material safety data sheets for both Get the Odor Out and Envirocon, the cleaning products Defendants used to remediate Plaintiffs' home, along with the Plaintiffs' expert disclosures. From such review he named the cleaning chemicals that form the basis of this portion of Ms. Kendall's claim: chlorine dioxide, sodium chlorite, sodium chlorate and an acute overwhelming chlorine exposure. Borak then specifically alleges that no such chemicals were, at any time herein, identified as existing in Plaintiffs' home. Moreover, while the Rowzee report noted the existence of

volatile organic compounds (VOC), Borak explained that the concentrations found were insignificant. He compared the Rowzee VOC findings to "their levels reported in US residences, office buildings and outdoor air." The comparison was notable because the levels of VOCs in the Kendall's home was at or near US outdoor levels and well below the average levels for US residences and office buildings. Borak found that the VOC "levels in the Kendall house ranged from 11,7000- to 2,900,000- fold *lower* than recommended workplace exposure levels."

These findings sever any specific causation link between Defendants use of the identified [*6]cleaning chemicals and the injuries underlying Plaintiffs' claims.

Borak also demonstrated the lack of a general causation link between Ms. Kendall's RADS, IIA and bronchitis conditions and the cleaning chemicals Defendants used by identifying a dearth of relevant scientific literature. He located only a few reports concerning the toxicity of chlorine dioxide inhalation, all of which "involved accidental releases of concentrated chlorine dioxide' gas." Here, however, Ms. Kendall does not allege exposure to concentrated chlorine dioxide gas. Similarly, Borak quoted an EPA report that states: "[n]o human inhalation exposure data for chlorite were located." Borak further concluded that there is no scientific literature associating chlorate salts to human pulmonary toxicity.

Borak likewise found, due to a stark deficiency of scientific literature, no general causation between Defendants' cleaning chemicals and Ms. Kendall's eczamatoid rashes, dermatitis, non-specific skin rashes, recurrent hemorrhagic cystitis, hematuria, and interrupted menstrual cycle conditions. After listing the numerous sources he reviewed, Borak reported that he found "no data to support the possibility that exposure to chlorine dioxide, chlorite salts or chlorate salts caused or contributed to [Ms. Kendall's] skin disease." Borak similarly found no medical literature that exposure to Defendants' cleaning chemicals "is associated with injury to the bladder, or recurrent cystitis, or recurrent UTIs" or with "menstrual disruptions or abnormal menstrual bleeding."

To summarize, Borak demonstrated that Ms. Kendall was not exposed to sufficient levels of the cleaning chemicals Defendants used to cause (specific causation) the conditions that form the basis of her personal injury claims. Similarly, Borak's review of

the medial literature applicable to such cleaning chemicals demonstrated a lack of general causation. As such, Defendants demonstrated their prima facie entitlement to summary judgment and shifted the burden of proof to Plaintiffs.

With the burden shifted, Plaintiffs raised no triable issue of fact in opposition to Defendants lack of causation showing.

Preliminarily, Plaintiffs offered no general causation proof linking Ms. Kendall's recurrent hemorrhagic cystitis, hematuria, and interrupted menstrual cycle conditions with exposure to any of the chemicals (CS tear gas or the cleaning chemicals) at issue in this action. Similarly, Plaintiffs offered no general causation proof linking the cleaning chemicals, or their byproducts, to any of Ms. Kendall's physical ailments. As such, Plaintiffs' opposition is necessarily limited, by general causation principals, to the specific causal connection between CS tear gas and Ms. Kendall's pulmonary and skin conditions.

Plaintiffs properly offered three supplemental expert affidavits (*McColgan v Brewer*, 84 AD3d 1573 [3d Dept 2011]; *Adams v Back*, 64 AD3d 1070 [3d Dept 2009]; *Abreu v Metro. Transp. Auth.*, __AD3d__ [2d Dept 2014]) to support their causation theory. However, the proof submitted was insufficient. The affidavits were made by a chemist, John Quinn (hereinafter "Quinn"), an engineer/certified hazardous material manger, Michael Klein (hereinafter "Klein"), and a physician, William Meggs (hereinafter "Meggs"). Each reviewed many of the same reports and documents as Borak and, importantly, offered no proof that additional testing or sampling of the Plaintiffs' residence was conducted.

Quinn's affidavit takes issue with Defendants' remediation of Plaintiffs' home and the post-remediation testing that was conducted. He alleged, without identifying the specific basis [*7]for his assertion, that "methylene chloride was... introduced into the [Plaintiffs'] home in conjunction with the CS tear gas." He then opined that the use of "Get the Odor Out which contains... stabilized chlorine dioxide is inappropriate for the remediation of CS tear gas and methylene chloride." He also alleged that Mr. Van Raalte's post-remediation testing of the Plaintiffs' home was insufficient. According to Quinn, the post-remediation sampling should have screened "for the presence of chlorine containing contaminants... to determine if any of the components of the remediation materials used... remained in the

home." He provided, however, no additional sampling or testing proof.

Klein's affidavit raises similar issues. He identified numerous deficiencies in Defendants' decontamination processes, including: the lack of both a decontamination plan and an Indoor Environmental Professional supervising the remediation; failure to properly decontaminate Plaintiffs' home's two air handling systems, its basement's suspended ceiling and its garage; and the failure to vaporize the CS by heating[FN8] the home. Moreover, Klein asserted that use of Get The Odor Out was "not recommended," it "can react [with CS-containing compounds] to form epoxide compounds." Because of these deficiencies, and others, according to Klein "more likely than not CS remained" in Plaintiffs' home after the Defendants' decontamination work was complete; and the Defendants' remediation "more likely than not created harmful byproducts and chemical exposure to [Plaintiffs.]" Although Klein offered these deficiencies, he did not offer any additional scientific testing proof.

Despite Quinn and Klein's remediation and testing criticisms, neither introduced any additional scientific proof, testing, or sampling to identify the post remediation presence of CS tear gas or any other cleaning chemical, or byproduct, in Plaintiffs' home. This lack of proof renders entirely speculative Quinn and Klein's opinions that such chemicals remained in the Plaintiffs' home. Contrary to the theory underlying theses expert's opinions, allegations of inadequacies in the decontamination process does not equate to the existence of CS tear gas or other chemicals in Plaintiffs' home. Such theory offers no admissible scientific proof, and fails to rebut Defendants' evidentiary showing. Moreover, neither Quinn nor Klein stated that such testing cannot be performed or explained why no additional testing has been conducted. (compare *Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599 [3d Dept 2007][although plaintiffs' expert's opinion was based on testing that showed only marginal exposure, plaintiffs' explained why such testing was inaccurate]).

This lack of scientific proof to establish the post-remediation chemical contamination of Plaintiffs' home renders Meggs' specific causation opinion wholly unavailing. Meggs recognized Ms. Kendall's April 2009 high level CS tear gas exposure, but did not discuss its continuing effects. Instead, he alleged that when Ms. Kendall returned home in October 2009 she exhibited "signs and symptoms... consistent with a reexposure to CS tear gas,

albeit at lower doses than the doses classically associated with toxicity." His "reexposure" theory, however, is entirely unsupported by any fact-based scientific proof. As set forth above, this record contains no test that identified the existence of CS tear gas in Plaintiffs' home after the Defendants' remediation was complete. Without such proof Meggs failed to properly support his specific causation [*8]opinion that residual CS tear gas caused Ms. Kendall's injuries. Similarly, he offered no basis or explanation for his "lower dose" / "classic dose" allegation. Meggs also wholly failed to address or dispute Borak's showing that Ms. Kendall's physical injury claims are attributable to her pre-existing conditions. As such, Meggs' affidavit and report raised no triable issue of fact in opposition to Defendants' prima facie showing.

In addition, despite Quinn and Klein's review of the cleaning chemicals Defendants used, Meggs does not state that such materials were a specific cause of Ms. Kendall's injuries. Instead, he claims that Ms. Kendall's "*ambient exposure* to the respiratory irritant chlorine and products containing chlorine are *evidence of* her chronic irritant sensitivity [which, according to Meggs, was allegedly caused by CS tear gas reexposure]." (emphasis added). Meggs neither restricted his "ambient exposure" statement to exposure in Plaintiffs' home, nor specifically ascribed the chlorine based decontamination materials as the specific cause of Ms. Kendall's chronic irritant sensitivity. Rather, in Meggs' opinion, it merely evidences the CS tear gas reexposure. Because Plaintiffs' offered no additional proof to establish the specific causal relationship between the cleaning chemicals used, or their byproducts, and Ms. Kendall's conditions, Plaintiffs raised no triable issue of fact on this issue.

To summarize, because Plaintiffs failed to offer a fact based showing that CS tear gas or the cleaning chemicals Defendants used remained in Plaintiffs' home after the remediation was complete, Plaintiffs raised no triable issue of material fact relative to the specific causation of Ms. Kendall's injuries. (see generally, Michael J. Hutter, *Cornell' Toxic Mold Case: Experts, Gatekeeping, Admissibility (Again)*, NYLJ, June 6, 2014 at 3 [noting that the Court of Appeal "is committed to a fact-based showing of specific causation to establish compliance with *Parker* [*v Mobil Oil Corp.'s*]" causation rationale).

Accordingly, Defendants' motions for summary judgment dismissing Ms. Kendall's

personal injury claims, and Mr. Kendall's derivative claims based thereon, are granted. Such holding renders moot Defendants' preclusion motions, Plaintiffs' motion to supplement their expert responses, Amica's motion for summary judgment dismissing all cross-claims against it, and Demaret's motion for summary judgment of Plaintiffs' claims against him personally.

Turning to Plaintiffs' motions to amend their complaints in both Actions #1 and #2, the motions are denied.

As this Court noted in determining Plaintiffs' prior motion to amend, "it is well settled that, where a proposed amendment is meritorious, leave should be freely granted absent prejudice or surprise to the other party." (*Webber v Scarano-Osika*, 94 AD3d 1304, 1305 [3d Dept 2012]). However, "denial of a motion to amend is appropriate when there is prejudice to the opposing party and no showing of a satisfactory excuse for the delay". (*Ciarelli v Lynch*, 46 AD3d 1039, 1040 [3d Dept 2007], *Nelson v State*, 67 AD3d 1142 [3d Dept 2009]).

Here, because Plaintiffs failed to offer a satisfactory excuse for the delay and Defendants would be prejudiced by the amendments, Plaintiffs' motions to amend are denied. First, Plaintiffs offered *no* excuse for their delay. In Action #1, they implicitly acknowledged their lack of excuse by asserting that they previously pled all of the facts underlying their proposed amended claim. In Action #2, Plaintiffs simply failed to offer any excuse allegation. Next, contrary to Plaintiffs' "lack of prejudice" assertions, permitting the addition of new legal theories into these actions at this late date would severely prejudice Defendants. Because discovery is [*9]closed Defendants are now unable to obtain additional information from Plaintiffs concerning the new legal theories proffered. Defendants would unquestionably be "hindr[ed] in the preparation of [their] case which could have been avoided had the original pleading contained the proposed amendment." (*Crawford v Burkey*, 93 AD3d 1134, 1135 [3d Dept 2012], quoting *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]).

Accordingly, Plaintiffs' motions to amend are denied.

Lastly, Amica demonstrated its entitlement to dismissal of Action #1's second cause

of action. Plaintiffs' second cause of action alleged Amica's breach of good faith and fair dealing, which was a duplication of their breach of contract cause action (Action #1's first cause of action). (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308 [1995]; *ERE LLP v Spanierman Gallery, LLC*, 94 AD3d 492, 493 [1st Dept 2012]). Because Plaintiffs did not oppose Amica's motion to dismiss their breach of contract cause of action based upon the expiration of its Statute of Limitations, they admitted the facts underlying the motion. (*Manculich v Dependable Auto Sales and Serv., Inc.*, 39 AD3d 1070 [3d Dept 2007]). The statute of limitations' expiration facts, now deemed admitted, that required dismissal of Plaintiffs' breach of contract (first) cause of action apply equally to Plaintiffs' breach of good faith and fair dealing (second) cause of action. Just as Amica demonstrated its entitlement to dismissal of Plaintiffs' first cause of action, it is equally entitled to dismissal of their second cause of action.

Accordingly, Amica's motion to dismiss Action #1's second cause of action is granted.

This Decision and Order is being returned to the attorneys for Amica. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 17, 2014

Albany, New York________________________________

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1.Notice of Motion, dated March 21, 2014; Affidavit of Panagiota Hyde, dated March 21, 2014, with attached Exhibits 1-35; Affidavit of Timothy Gerardi, dated March 17, 2014, with attached Exhibits A-K; Affidavit of Brian Campbell, dated March 17, 2014, with attached Exhibits A-D; Affidavit of Jonathan Borak, dated March 20, 2014, with attached Exhibits A-B.

2.Notice of Motion, dated March 29, 2014; Affirmation of Andrea Smith, dated March 29, 2014, with attached Exhibits A-E.

3.Notice of Cross-Motion, dated March 24, 2014; Affirmation of Benjamin Neidl, dated March 24, 2014

4.Notice of Cross-Motion, dated May 2, 2014; Affidavit of James Linnan, dated May 2, 2014; Notice of Cross-Motion, dated May 2, 2014; Affidavit of James Linnan, dated May 2, 2014, with attached Exhibits A-H; Affidavit of William Meggs, dated May 1, 2014, with attached "References" and Exhibit A; Affidavit of John Quinn, dated January 17, 2014, with attached unnumbered exhibit; Affidavit of Michael Klein, dated May 2, 2014, with attached unnumbered exhibit.

5.Affidavit of Panagiota Hyde, dated May14, 2014; Affidavit of Jonathan Borak, dated May 13, 2014.

6.Affirmation of Andrea Smith, dated May 13, 2014, with attached Exhibit F; Affidavit of Jonathan Borak, dated May 13, 2014; Affirmation of Andrea Smith, dated May 13, 2014 (two originals submitted).

7.Affirmation of Benjamin Neidl, dated May 14, 2014, with attached Exhibit A.

Footnotes

Footnote 1: The two captioned actions were joined for trial by this Court's February 18, 2014 Letter Order. The motions made in each action will be decided in this single Decision and Order.

Footnote 2: "Defendants" will refer collectively to USA Decon, Robert Demaret, Duct and Vent Cleaning of America, Inc., and Amica Mutual Insurance Company.

Footnote 3: It is uncontested that Borak is qualified to offer expert testimony on the issues involved in this litigation.

Footnote 4: Mr. Kendall discontinued his personal injury claims, leaving him with a derivative claim based upon Ms. Kendall's alleged injuries.

Footnote 5: Although such test was inconclusive for establishing that Ms. Kendall's asthma was caused by CS tear gas or any other chemical exposure, it did verify Ms. Kendall's underlying asthmatic condition.

Footnote 6: By reviewing the relevant medical literature, Borak also demonstrated the lack of general causation between CS tear gas and Ms. Kendall's recurrent hemorrhagic cystitis, hematuria, and interrupted menstrual cycle conditions.

Footnote 7: Borak also noted that Ms. Kendall's interrupted menstrual cycle complaint only occurred prior to the completion of Defendants' remediation work, precluding a specific causation finding. In addition, based upon his review of the scientific literature, Borak demonstrated the lack of general causation for Ms. Kendall's hemorrhagic cystitis, hematuria, and interrupted menstrual cycle claims.

Footnote 8: Interestingly, at her deposition Ms. Kendall stated that she hired USA Decon because their proposed decontamination methods did not include the use of this heating process.

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