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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CRYSTAL COUTU, Plaintiff and Appellant, v. CMG MORTGAGE, INC., Defendant and Respondent.	B270488 (Los Angeles County Super. Ct. No. BC517735)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph Rogers, Judge. Reversed.

Paul Kujawsky for Plaintiff and Appellant.

Buchalter, a Professional Corporation, Robert M. Dato and Jason E. Goldstein for Defendant and Respondent.

Plaintiff and appellant Crystal Coutu sued her former landlord, defendant and respondent CMG Mortgage (CMG), asserting that she suffered serious physical problems as a result of exposure to toxic mold in her rental house. The trial court granted summary judgment for CMG, concluding that Coutu's claim was barred by the two-year statute of limitations applicable to her claim.

We reverse. As we discuss, CMG's summary judgment evidence was insufficient to satisfy its initial burden to show either that Coutu's claim was time-barred or, alternatively, that Coutu had not and could not establish causation. Thus, because CMG did not make a prima facie showing justifying judgment in its favor, the trial court erred in granting summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint

On August 8, 2013, Coutu filed a complaint[1] against her former landlord, CMG, asserting a single cause of action for premises liability. Coutu alleged that she rented a home in Lancaster, California from CMG. The rental home "was mold infested and plaintiff became ill due to the mold infestation. [Defendant] ha[d] a duty to plaintiff to provide a safe and habitable living environment. [Defendant] breached that duty and [was] negligent in allowing the mold infestation without warning plaintiff or remedying the condition. Plaintiff was injured and required medical attention as a result."

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[1] On September 29, 2015, Coutu filed a first amended complaint, adding a second cause of action for breach of the rental agreement. The first amended complaint apparently was never served.

B. CMG's Motion for Summary Judgment

In September 2015, CMG filed a motion for summary judgment. CMG urged that Coutu's action was barred by the two-year statute of limitations because Coutu was on inquiry notice of her claim no later than August 7, 2011, but did not file suit until August 8, 2013. It further urged that Coutu had no evidence of causation and her suit was barred by laches.[2]

In support of its statute of limitations argument, CMG provided Coutu's verified interrogatory responses, which stated (among other things) that as a result of her exposure to toxic mold, Coutu developed chronic colitis and experienced headaches, blisters on her face and inside her mouth, skin rashes, chest heaviness, difficulty breathing, hair loss, weight loss, irritability, fatigue, severe leg pain, abdominal swelling, rectal bleeding, and a seizure. Coutu did not experience any of these symptoms before she was exposed to mold. CMG also submitted nine photographs, produced by Coutu during discovery, of mold in Coutu's rental house on June 26, 2011; and a doctor's note provided to Coutu by the High Desert Health System, dated August 10, 2011, stating that Coutu had been under a doctor's care "from 8-7-11 to 8-10-11" and was not able to return to work on August 10, 2011, because of "allergies/asthma [illegible] dust/mold exposure in home."

In support of its causation argument, CMG noted that in response to form interrogatories, Coutu had stated that she had no "reports" concerning the "incident."

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[2] CMG has not pursued its laches theory on appeal; therefore, we do not discuss it further.

C. Coutu's Opposition to Motion for Summary Judgment

Coutu opposed the motion for summary judgment. Among other things, Coutu contended that she did not know until sometime after August 8, 2011 that she was suffering a serious illness caused by exposure to toxic mold; she therefore urged that her action was timely. In support, Coutu, who was representing herself, submitted an unsigned declaration and 26 unauthenticated exhibits.[3]

D. Order Granting Motion for Summary Judgment

The trial court granted the motion for summary judgment. In its written order, it explained: "Plaintiff filed her complaint on August 8, 2013. [Thus], her cause of action must have accrued on August 8, 2011 or after in order to avoid the statute of limitations[.] . . . [¶] . . . [¶] . . . Plaintiff's own submitted evidence establishes that, at the latest, on August 7, 2011, she went to a hospital facility for symptoms that she alleges are the result of mold exposure. She was also aware of the mold, and suspected it may have been a cause of her symptoms, on that date. While Plaintiff might contend that she did not *know* it was the mold that caused her injuries, and that she thought it more likely some other source was the cause, the case law is clear that the act of accrual is not *confirmation*, but *suspicion*. Plaintiff had all the facts necessary to suspect, and did in fact suspect, that mold was the cause of her injuries as of August 7, 2011. The

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[3] CMG objected to Coutu's declaration and exhibits on a variety of grounds. There is no indication in the appellate record that the trial court ruled on CMG's objections. However, we need not consider whether Coutu's evidence was admissible because, as we discuss, CMG did not make a sufficient showing to shift the burden of proof to Coutu.

statute of limitations began to run then, and [two years] from the date of accrual is August 7, 2013, one day prior to the date Plaintiff filed suit. [¶] . . As such, Plaintiff's suit is barred by the statute of limitations." (Internal record citations omitted.)

Judgment in favor of CMG was entered on January 4, 2016. Coutu timely appealed.

DISCUSSION

I.

Summary Judgment Standards and Standard of Review

" 'The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is appropriate 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).)

"A defendant who moves for summary judgment or summary adjudication bears the initial burden to show that the action or cause of action has no merit—that is, 'that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action.' (Code Civ. Proc., § 437c, subds. (a), (p)(2).) When the burden of proof at trial will be on the plaintiff by a preponderance of the evidence, the moving defendant 'must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an

element of the claim cannot be established, by presenting evidence that the plaintiff "does not possess and cannot reasonably obtain, needed evidence" ' to support a necessary element of the cause of action. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003, quoting *Aguilar*, *supra*, 25 Cal.4th at p. 854; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

"If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 59–60.) However, if the defendant makes a prima facie showing that justifies a judgment in its favor, the burden then shifts to the plaintiff to make a prima facie showing that there exists a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) 'The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists, but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . .' (Code Civ. Proc., § 437c, subd. (p)(2).)

"On appeal, we conduct a de novo review of the record to 'determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.' (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334; see *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 58.) We apply the same procedure used by the trial court: We examine the pleadings to ascertain the

elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84–85; *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 887.)" (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 804–806.)

II.
The Trial Court Erred in Concluding that Coutu's Claims Were Time-Barred As a Matter of Law

The parties agree that Coutu's claim is subject to the two-year statute of limitations set forth in Code of Civil Procedure section 340.8. The issue before us, therefore, is the date on which Coutu's claims accrued.

CMG contends, and the trial court concluded, that Coutu's claims accrued as a matter of law on August 7, 2011, the date on which Coutu first sought medical treatment for symptoms she now attributes to mold exposure. CMG urges that the statute of limitations on Coutu's claims therefore ran on August 7, 2013, one day before Coutu filed suit. Coutu, in contrast, contends that although she sought medical treatment on August 7, 2011, she was not then on inquiry notice that the symptoms for which she sought treatment were caused by toxic mold exposure, and thus her claims are timely.

As we now discuss, CMG's evidence was insufficient to meet its initial burden, as the moving party, to establish that Coutu was on inquiry notice of her claim as a matter of law on

August 7, 2011. Accordingly, the trial court erred in granting summary judgment on statute of limitations grounds.

A. The Discovery Rule

" 'Traditionally at common law, a "cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." [Citation.] This is the "last element" accrual rule: ordinarily, the statute of limitations runs from "the occurrence of the last element essential to the cause of action." [Citations.]' (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192.)

" 'An important exception to the general rule of accrual is the "discovery rule . . . ." ' (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) ' "A cause of action under this discovery rule accrues when ' "plaintiff either (1) actually discovered his injury and *its negligent cause* or (2) could have discovered injury and *cause* through the exercise of reasonable diligence [italics added]." ' [Citation.] The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. [Citation.] Subjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation. [Citations.]" ' (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 108.)

"Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff

becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. (*Fox*, *supra*, 35 Cal.4th at p. 808 ['to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes . . .'].) If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether 'such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.' (*Fox*, *supra*, 35 Cal.4th at pp. 808–809.) [¶] . . . [¶]

" 'When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally *a question of fact*, properly decided as a matter of law only if the evidence . . . can support only one reasonable conclusion.' (*Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921 (*Broberg*); see *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 175 ['[T]he question of when "a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule . . ." [may] be decided as a matter of law . . ." ' only 'if the undisputed facts do not leave any room for reasonable differences of opinion'].)" (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251–1252, some italics added.)

B. CMG's Evidence in Support of Summary Judgment Motion

CMG presented very limited evidence in support of its contention that Coutu's claim was barred by the statute of limitations. That evidence was the following:

- During discovery, Coutu produced nine photographs, taken on June 26, 2011, of mold in her rental house.
- CMG propounded form interrogatories, in which it asked, among other things, whether Coutu "receive[d] any consultation or examination . . . or treatment from a health care provider for any injury you attribute to the incident?" In response, Coutu stated that she saw a doctor on August 8, 2011. The doctor ordered a chest X-ray, blood work, and a stool sample; results of these tests showed inflammation in her lungs and blood in her stool.
- An August 10, 2011 doctor's note provided to Coutu by the High Desert Health System stated that Coutu had been under a doctor's care "from 8-7-11 to 8-10-11" and was not able to return to work on August 10, 2011. It described her "illness or injury" as "allergies/asthma [illegible] dust/mold exposure in home."

C. CMG's Evidence Was Insufficient to Make a Prima Facie Showing That Coutu Was on Inquiry Notice of Her Claims as of August 7, 2011

The trial court concluded that, as a matter of law, Coutu was on inquiry notice of her claim no later than August 7, 2011, the date by which she first sought medical attention for symptoms she now attributes to toxic mold exposure. CMG contends the ruling was correct because Coutu "knew she had been exposed to mold and knew it might be harming her when

she sought medical attention on August 7, 2011." But none of the evidence provided by CMG in support of its summary judgment motion established that by August 7, 2011, Coutu knew, or had reason to know, that the mold in her rental home was the cause of her symptoms. At best, that evidence established that on August 7, Coutu sought medical attention for unidentified symptoms; on August 8, her doctor ordered a chest X-ray, blood work, and a stool sample; and *by August 10*, her doctor believed Coutu's symptoms resulted from "allergies" or "asthma" related to exposure to either "dust" or "mold."

CMG urges, and the trial court concluded, that Coutu was on inquiry notice of her claims as soon as her symptoms became serious enough to require medical attention. None of the cases of which we are aware suggest that result. For example, in *Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, the plaintiff, who worked with powders and chemicals, began experiencing irritation in his lungs as early as 2000; was hospitalized for symptoms of pneumonia in 2005; and was diagnosed with a chronic lung condition in July 2006. Nonetheless, the Court of Appeal held that the plaintiff's complaint, filed in October 2008, was not barred by the two-year statute of limitations as a matter of law: "Rather than suspecting he or she had been wronged in some way, a reasonable person would do what Rosas did, which is to visit a doctor when a cold and cough continues and seems to be getting worse. But when a doctor tells a patient his symptoms are normal, and a lung specialist is unable to determine the cause of the patient's lung disease, we cannot conclude as a matter of law that a reasonable person would suspect the disease has a wrongful cause. . . . Without additional facts, we cannot determine as a matter of law that the facts available to Rosas

before November 2006 would put a reasonable person on inquiry notice that his disease was caused by wrongdoing." (*Rosas*, *supra*, at p. 1395.)

Similarly, in *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, the plaintiff, a nurse, began suffering from rashes and having difficulty breathing in 1992; she consulted an allergist in January 1994, who told her she might be allergic to latex gloves; but she did not sue the latex glove manufacturer until January 1996. The Court of Appeal held that the plaintiff's claim was not barred by the (then) one-year statute of limitations as a matter of law: "In the case before us, it cannot be said that Clark had discovered all of the essential facts to constitute a products liability cause of action when she learned of her allergy, since triable issues of fact have been raised regarding her knowledge or awareness that a defendant's wrongdoing may have affected the product, latex gloves, that was giving rise to her allergies." (*Clark*, *supra*, at pp. 1058–1059.)

And in *Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, the case on which CMG principally relies, the plaintiff learned in February 1983 that her condominium unit had been flooded; in September 1983, she began suffering allergies and asthma; in August 1984, she learned there was mold in her condominium; and in October 1984, she advised the condominium association that she was moving out of the condominium because of a severe allergic reaction to mold in the unit. Although the Court of Appeal determined that her complaint, filed in August 1986, was barred by the one-year statute of limitations, it concluded that the limitations period was not triggered until *October 1984*, when

plaintiff indisputably knew that her allergic reaction was caused by the mold in her unit. (*Id.* at pp. 1623–1624, 1628.)

Taken together, these cases make clear that physical symptoms, coupled with knowledge of the presence of mold, is not sufficient to trigger the statute of limitations. Instead, a plaintiff is not on inquiry notice of her claim until she is both aware of her injury *and has reason to suspect the injury was caused by someone's wrongdoing*. On the record before us, a trier of fact need not have concluded that by August 7, 2011, a reasonably prudent person in Coutu's position would have suspected that her symptoms were caused by the mold in her rental home. To the contrary, a reasonably prudent person might well have attributed her symptoms to other, non-negligent causes, such as a virus, a bacterial infection, an allergic reaction to something other than mold, or something else entirely. Thus, Coutu was not on inquiry notice as a matter of law on August 7, 2011.

CMG next contends that Coutu's response to Form Interrogatory No. 6.4 demonstrates that Coutu suspected by August 7 that her injuries were caused by mold. It does not. The interrogatory asked whether Coutu "receive[d] any consultation or examination . . . or treatment from a health care provider for any injury you attribute to the incident?"; in response, Coutu stated that she saw a doctor on August 8, 2011. This response does not suggest, as CMG urges, that *in August 2011* Coutu attributed her symptoms to "the incident" (mold exposure); instead, it says only that Coutu *now* attributes to such exposure the symptoms she experienced in August 2011. In any event, Coutu identifies August 8, *not* August 7, as the day she first received treatment.

Finally, even were we to conclude, as CMG suggests, that a reasonably prudent person in Coutu's position would have suspected by August 7 that her symptoms were the result of wrongdoing, we could not affirm the grant of summary judgment without evidence that, had Coutu investigated the cause of her symptoms on August 7, " 'such an investigation would have disclosed a factual basis for a cause of action[.]' " (*Alexander*, *supra*, 219 Cal.App.4th at p. 1251.) CMG presented no such evidence.

For all of these reasons, therefore, CMG never satisfied its initial summary judgment burden of establishing that Coutu's claim was time-barred. Accordingly, the burden of presenting evidence never shifted to Coutu, and the trial court erred in granting summary judgment on statute of limitations grounds.

III.
CMG Was Not Entitled to Summary Judgment on Causation Grounds

Because we review de novo a trial court's decision to grant a summary judgment motion, we may affirm the trial court's ruling on any ground set forth in the motion for summary judgment, regardless of the grounds relied on by the trial court. (E.g., *Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1147, fn. 3; *American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 747–748.) Thus, although we have concluded that the trial court erred in granting summary judgment on statute of limitations grounds, we cannot reverse the judgment without first considering any alternative grounds on which CMG sought summary judgment.

As an independent ground for summary judgment, CMG asserted that Coutu "failed to present any evidence of causation,"

an essential element of her cause of action for premises liability.[4] (*McIntyre v. Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671 [" 'The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages.' "].) To support its claim that Coutu had not established causation, CMG relied solely on Coutu's response to Form Interrogatory No. 12.6, which asked: "Was a report made by any PERSON concerning the INCIDENT?" Coutu's response stated: "At the present time, no, however discovery and investigation [are] ongoing."

Coutu's response to Interrogatory No. 12.6 was insufficient to carry CMG's initial summary judgment burden and, therefore, to shift the burden of production to Coutu. As we have said, when the burden of proof at trial will be on the plaintiff, a defendant moving for summary judgment may, in lieu of presenting affirmative evidence disproving an essential element of plaintiff's cause of action, present evidence "that the plaintiff *does not possess, and cannot reasonably obtain*, needed evidence." (*Aguilar*, *supra*, 25 Cal.4th at p. 855, italics added.) CMG asserts that Coutu's response to Interrogatory No. 12.6 was sufficient to shift the burden to Coutu because it established that Coutu did not possess evidence necessary to prevail at trial. We do not agree. Although Coutu's response arguably established that

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[4] CMG raised this alternative ground in its respondent's brief. It noted that this court "must afford the parties an opportunity to present their views on a ground the trial court did not rely on if it intends to affirm on that ground. Rather than dealing with this alternative ground by supplemental brief, CMG raises the issue now so that Coutu may respond in her reply brief."

Coutu did not, at the time she served her interrogatory responses, have a "report" stating that her injuries were caused by mold exposure, nothing in her response suggested that she did not have such evidence in another form. And, even had CMG established that Coutu did not then possess needed evidence, it in no way established that she could not "reasonably obtain" such evidence. Accordingly, CMG has not demonstrated that it is entitled to summary judgment on causation grounds.

DISPOSITION

The summary judgment is reversed. Coutu is granted her appellate costs.

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EDMON, P. J.

We concur:

LAVIN, J.

KALRA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.