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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

MINDY CHAPMAN et al.,

Plaintiffs and Appellants,

v.

KENSINGTON PARK RESIDENTIAL PROPERTY OWNERS ASSOCIATION,

Defendant and Respondent.

2d Civil No. B234490
(Super. Ct. No. 56-2008-00334127-CU-CO-SIM)
(Ventura County)

Plaintiffs Mindy Chapman and Megan Shapiro appeal a judgment in favor of defendant Kensington Park Residential Property Owners Association (the Association) after a court trial on their toxic mold property damage and personal injury action. We conclude, among other things, that: 1) the trial court's "nonsuit" was in fact the grant of a "motion for judgment" under Code of Civil Procedure section 631.8[1]; 2) the court did not err by granting judgment after the presentation of plaintiffs' case because there was insufficient proof that water from the Association's common areas caused mold contamination on Chapman's property; and 3) the court did not abuse its discretion by limiting the evidence plaintiffs' expert witnesses could present at trial. We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

FACTS

Chapman and her daughter, Shapiro, moved into a house in the Association's "condominium" development in 2004. Chapman rented it and then purchased it in 2005. The Association's covenants, conditions and restrictions (CC&R's) provide the Association is responsible for the common areas. The individual members own their homes, garages and backyards as a "separate interest." (Civ. Code, § 1351, subd. (l).) Chapman admitted she was responsible for maintaining the plumbing on her property.

Chapman and Shapiro filed an action for damages against the Association. They alleged they sustained property damage and personal injuries as a result of "toxic mold" which came from "water intrusion from various common" areas under the Association's control.

The Association filed motions in limine and the trial court held Evidence Code section 402 hearings. It found: 1) plaintiffs' medical experts lacked foundation for their opinions that plaintiffs suffered illnesses from toxic mold exposure, 2) there was no evidence of mycotoxins at the residence, and 3) some experts were not qualified to testify.

At trial, Paul Taylor, plaintiffs' mold expert, said he collected mold samples at the Chapman home that contained stachybotrys. One side of the home had "a high mold count." He recommended that Chapman "decontaminate" and remove "drywall." At his deposition he testified he had not "seen any water staining at the property."

Avry Mizrahi, a licensed general contractor, testified he dug a hole in Chapman's backyard and saw "water . . . seeping up into the hole." The backyard was "soggy." There was a drainage pipe "buried in the dirt" on Chapman's property. He did not know when it was installed.

Ronald Neff, a neighbor in an adjoining unit, said water was "pooling behind Chapman's property," and he felt it could be under his home. He installed a drainage pipe in his backyard.

Chapman testified water seeped into her home from the foundation and it came up through the "grout." There was a history of plumbing leaks at her home. Her backyard was always soggy and she discovered pipes under it were "not connected." She moved out of the house from January to November 2007 after she discovered mold. She discovered mold in 2010, and had to replace her furniture. In a 2005 letter, she claimed her home and garage were "being destroyed as a result of [the] hot water tank's ill-repair." In a letter to an insurance company, she said flooding from her water heater was "probably creating mold."

After the completion of the plaintiffs' case, the trial court granted a nonsuit on the ground plaintiffs had not proven liability.

DISCUSSION

The Motion for a Nonsuit

Appellants contend the trial court erred by granting a nonsuit.

The Association filed a "motion for non-suit" claiming there was no "sufficient evidence to establish that there was water that came from a common area space into . . . [Chapman's] property." The trial court granted it and called it a "Non Suit."

But a "nonsuit is appropriate only after a jury trial." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 314, fn. 23.) The trial here was a court trial. The trial court's misnomer is of no consequence. It in effect granted a "motion for judgment" in a court trial under section 631.8. (*Jazayeri*, at p. 314, fn. 23.)

The Standard of Review

Appellants claim the standard of review is the one utilized for jury trial nonsuits where the trial court must "indulg[e] every legitimate inference" in favor of their witnesses. We disagree.

Because this was a section 631.8 motion, we give appropriate deference to the trial court. "Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof." (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139

Cal.App.4th 1006, 1012.) It "assesses witness credibility and resolves conflicts in the evidence." (*Ibid.*) "On appeal, we view the evidence in the light most favorable to the judgment." (*Ibid.*)

Abuse of Discretion by Granting a Section 631.8 Motion

Appellants claim the trial court erred by granting a section 631.8 motion. "'A judgment or order of the lower court is *presumed correct*.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The Association claims the trial court could find a conflict between Chapman and her expert on water seepage and water staining issues. Chapman testified "there was water . . . *apparently* seeping in through [the] foundation" of her home. (Italics added.) She said water leaked into "the family room" in the "middle of the floor" and came "up through the grout," and there was evidence of water staining. But Taylor saw no evidence of "water staining . . . on the drywall of the family room den area," on "the drywall in the kitchen area," on "the tile in the den area," or elsewhere "at the property."

The Association claims there was "no competent evidence that water was seeping from the adjoining common areas into [Chapman's] backyard," and the trial court could find the water causing mold came from Chapman's property. We agree.

Chapman admitted she was responsible for maintaining the plumbing on her property. She said there was a "repetitive problem" with a "hot water heater leak" at her residence, "massive floods" from a pipe leak in her garage, and the garage walls became "soaked." A plumber advised her that she had "leaky" plumbing in her home. There had been a "flood" from an "upstairs bathroom," a "copper piping" problem, and a leak in her laundry room. She did not know if there had been remediation procedures for the water damage. The trial court could find she was impeached by letters she wrote claiming her water heater leaks caused damage to her home and garage, and were "probably creating mold."

Chapman said her backyard was "generally soggy." The Association notes there was a retaining wall between her property and its common areas. Her backyard was

inside the retaining wall. Mizrahi dug a hole in her yard and saw "water seeping up." But that was not proof that water came from the common areas. Chapman said pipes *under her yard* were "not connected." Mizrahi did not test to determine if water came from the common areas, and he was not a hydrologist.

Appellants note the trial court read the deposition of their "mold expert" Edson Stroll.[2] They claim it had to accept his opinion that water was flowing from the common areas into Chapman's property. We disagree. Stroll had no formal education in hydrology or geology. He did not know the type of soil in the common areas adjacent to Chapman's property or whether there was a "moisture barrier" underneath "the slab of the Chapman property." He did not know the type of concrete used for the home's foundation. "[A] trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it . . . ." (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 149.) The court could find appellants' evidence about water source and causation was not persuasive because of evidentiary conflicts, credibility issues and the failure to call a hydrologist or other qualified expert.

Excluding Dr. Gunnar Heuser's Testimony

Appellants claim the trial court erred by excluding Gunnar Heuser's opinion that "the symptoms suffered by Plaintiffs were consistent with toxic mold exposure."

The Association claims Heuser's opinions were not based on adequate foundation. We agree. "A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

In an Evidence Code section 402 hearing, Heuser testified about "[SPECT] scanning" in medical diagnosis. But he answered "no" when asked, "[H]as [SPECT] scanning become an approved testing method in the United States for the diagnosis of mold-related illnesses?" The unreliability of Heuser's SPECT scanning method was the

[2] At oral argument, Chapman's counsel filed a motion to augment the record with "excerpts from [the] deposition of Edson Stroll." The motion is denied. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 909, fn. 8; *Estate of Obernolte* (1979) 91 Cal.App.3d 124, 130, fn. 8.)

subject of a prior decision. (*Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 405.)

Heuser said various molds produce mycotoxins--poisons that cause illness. (*Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1302.) But there was no testing to establish the presence of myotoxins at this property. An opinion that a plaintiff suffers from toxic mold illness is speculative unless it is supported by mycotoxin testing. (*Id*. at pp. 1310-1311.) The "absence of any testing for mycotoxins" constitutes an omission of a necessary foundational fact. (*Id*. at p. 1310.) An expert's speculation does not suffice. (*Id.* at p. 1311; see also *Dee v. PCS Property Management, Inc.*, *supra*, 174 Cal.App.4th at pp. 404-405.) Appellants have not shown an abuse of discretion.

T*he Motion in Limine Regarding Dr. Franklin Rivers' Testimony*

Appellants contend the trial court erred by preventing Franklin Rivers from testifying that toxic mold caused their illnesses. The trial court has substantial discretion in determining an expert's qualifications. (*Naples Restaurant, Inc. v. Coberly Ford* (1968) 259 Cal.App.2d 881, 883.)

Rivers could not opine on whether appellants had mold-related illnesses without mycotoxin testing. (*Dee v. PCS Management, Inc., supra*, 174 Cal.App.4th at pp. 404-405; *Geffcken v. D'Andrea, supra*, 137 Cal.App.4th at pp. 1310-1311.) He was not a California licensed medical doctor, and appellants represented that he would not be offering "any medical opinions specifically as to [them]."

Rivers formed a company to render homes "free of mold species." The trial court properly sustained the Association's objections to his proposed testimony on causation, water flows and repair estimates. Rivers had no formal education in hydrology, soils, geology or construction. He was not a licensed contractor, a landscaper, a landscape architect, or a civil engineer. He did not perform tests on Chapman's property. He did not know the type of soil there, the "cut or fill" of that property, and he had "no idea whether there is a moisture barrier" under it. But even had Rivers and Heuser testified about mold-related illnesses, the result would not change because appellants did not prove the Association was responsible for the presence of mold.

Excluding David Ostrove's Testimony

Appellants argue the trial court erred by excluding David Ostrove's testimony about the "diminution in value" of Chapman's property. But because appellants did not prevail on liability, damage evidence would not change the result.

Excluding Testimony of Paul Taylor

Appellants claim the trial court erred by excluding portions of the testimony of Paul Taylor, their "mold collection" expert. We disagree. An expert who seeks to testify on a highly technical scientific area must have sufficient expertise, knowledge, skill, training and education. (*Dee v. PCS Property Management, Inc.*, *supra*, 174 Cal.App.4th at p. 403.)

The Association sought to exclude Taylor from testifying on the "results of mold sampling" because he was not a qualified expert. Taylor had no training in microbiology, hydrology, microscopy, geology, or toxicology. He was not a "certified industrial hygienist." He had a "high school diploma via GED." He had never tested mold prior to this case. His knowledge of the types of mold was limited. He did not know the difference between "penicillium and aspergillus," or what "ascospores" and "basidiospores" were. Appellants have not shown either an abuse of discretion or how the excluded evidence would change the result. The trial court found no evidence of mycotoxins at the residence. Taylor did not take "any samples for mycotoxins."

Excluding the Testimony of Thomas Murphy

Appellants claim the trial court erred by preventing Thomas Murphy, an engineer, from testifying in their case. Murphy was an expert designated by the defense. Appellants did not list him as an expert. The Association objected because Murphy had not been deposed. The court properly sustained the objection. Section 2034.310, subdivision (a) provides, in relevant part, "A party may call as a witness at trial an expert not previously designated by that party if . . . [¶] [t]hat expert has been designated by another party and *has thereafter been deposed* . . . ." (Italics added.) "'The deposition requirement protects against whatever surprise or advantage may be encountered where a *different* party offers that expert's testimony at trial.'" (*Powell v. Superior Court* (1989)

211 Cal.App.3d 441, 445.) Appellants did not depose Murphy, but argue he was not called as an expert. But during the offer of proof, appellants' counsel said: 1) Murphy prepared "a report" containing "*opinions*," and 2) "*he is an expert and can therefore give those opinions*." (Italics added.) The court could find they called him as an expert. Appellants claim he was also a "percipient" witness. But, as the Association notes, counsel did not specify what Murphy would "say on the witness stand." Without an adequate offer of proof, this claim of error fails. (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 758.)

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles McGrath, Judge

Superior Court County of Ventura

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