KAUFMAN DOLOWICH LLP

KD Alert: New York Court Clarifies Threshold for Mold Infestation

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Although New York City real estate landlords and co-op and condo board members typically do not inhabit the properties they own and manage, a recent First Department decision gives them reason to fear the impact of mold infestation. After a 2009 New York Supreme Court decision holding that there is a lack of scientific evidence to support a finding that mold exposure can cause injury, landlords and board members were able to breathe easy. Now, however, the First Department has reversed this holding, thereby affirming the potential for liability as a result of mold infestation in New York City apartments.Cornell v. 360 W. 51st St. Realty, LLC, Nos. 113104/04, 4810, 2012 N.Y. App. Div. LEXIS 1614 (N.Y. App. Div. 1st Dep't Mar. 6, 2012).

*In Cornell, the First Department clarified its rule regarding causation. The Court held that it is "undisputed that exposure to toxic mold is capable of causing the types of ailments from which [Cornell] suffers." Cornell, 2012 N.Y. App. Div. LEXIS 1614, at *19. In that case plaintiff contended that she suffered a body rash, shortness of breath, fatigue, disorientation, and headaches as a result of mold in her bathroom, a theory confirmed by experts at trial. The Court held that the trial court below misapplied Fraser v. 301-52 Townhouse Corp., a prior First Department decision holding that the plaintiffs failed to establish a causal connection between their injuries and alleged mold exposure. Fraser v. 301-52 Townhouse Corp., 870 N.Y.S.2d 266 (N.Y. App. Div. 1st Dep't 2008). However, the court below failed to heed the Fraser caveat regarding its limited application, thereby necessitating the dismissal of plaintiff's claims. The First Department noted that Fraser was incorrectly applied as a general rule that scientific evidence cannot confirm mold exposure as a cause of, inter alia, respiratory disease. Accordingly, the First Department's decision in Cornell makes clear that it does not apply a categorical rule when evaluating whether a claimant's alleged injuries were caused by mold exposure and, instead, will consider each matter on a case-by-case basis.*

In light of the First Department's proper interpretation of Fraser, New York Courts will not, as a matter of course, dismiss claims alleging injury due to mold exposure based on lack of causation. Instead, New York Courts will examine whether there was mold exposure, whether the alleged bodily injuries were caused by such exposure, and whether such causation is scientifically supported based on the relative injuries, expert testimony, and specific mold exposure in each case.

As a result, property owners and managers should be proactive regarding the presence of mold. The First Department's decision can be expected to generate more claims, and it is critical that businesses are prepared.

If you have questions about the information presented in this email, please contact Ivan Dolowich or Michael Zigelman. KD's attorneys can assist you in ensuring that "best practices" are in play, thereby minimizing the exposure to liability. "

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