IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Vincent Ferraro, Omar Rodriguez, Craig Schrader, Robert Sikorsky, Anthony Todaro and Kevin Quinter, Appellants | : | |
| v. | : | |
| The County of Northampton, Glenn Reibman, James Smith, Todd Buskirk and Scott Hoke and Aramark Correctional Services, Inc. | : | No. 1496 C.D. 2010 Submitted: November 5, 2010 |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI Filed: January 5, 2011

Vincent Ferraro, Omar Rodriguez, Craig Schrader, Robert Sikorsky, Anthony Todaro, and Kevin Quinter (collectively, the Officers) appeal from an order of the Court of Common Pleas of Northampton County (trial court) granting the motions for summary judgment filed by the County of Northampton (County), Glenn Reibman, James Smith, Todd Buskirk, Scott Hoke (collectively, the County

Officials),[1] and Aramark Correctional Services, Inc. Finding no error in the trial court's decision, we affirm.

## I. Factual Background

The relevant facts as alleged in the second amended Complaint are as follows. The Officers are all employed by the County as corrections officers at the Northampton County Prison (Prison). Their complaint stems from injuries ranging from headaches, fatigue and depression to chronic sinusitis and diabetes, which they allegedly sustained during the course of their employment due to exposure to supposed "toxic mold" within the Prison. The Officers allege that in constructing an addition to the Prison in 1993, the County failed to install water resistant bladders in the floor under the shower stalls. These shower stalls are located directly above the Prison's dining hall and food preparation areas. A drainage system problem then developed, causing water and sewage to leak and collect in the floor and walls and eventually causing "toxic mold" growth in various areas throughout the Prison, including the dining hall and kitchen.[2] The Officers allege that Aramark, which provided food preparation and service for the Prison inmates and staff, had custody

[1] Glenn Reibman previously served as Executive of Northampton County and supervised the other County Defendants until his retirement. Reproduced Record (R.R.) at 35a. James Smith served as Director of Corrections for the County and is now retired. *Id.* Todd Buskirk previously served as Warden for the Prison until he was promoted to Director of Corrections. *Id.* Scott Hoke is the current Warden for the Prison. *Id.*

[2] It is undisputed that the Prison did indeed have mold issues, as the Pennsylvania Department of Labor and Industry issued a Mold Abatement Order in 2003 requiring the County to remediate the mold problem at the Prison. However, the parties disagree as to the extent of the mold problem and whether or not it can be categorized as "toxic" mold.

and control of the kitchen and dining areas as well as the equipment contained therein, and that it failed to remove the mold growing in those areas or to properly clean its equipment. They also claim that the individual County Officials knowingly misrepresented the mold situation to them and, as a result, the Officers' injuries were aggravated because they continued to work in areas of the Prison that were allegedly infested with mold.

## II. Procedural Background

The Officers initiated the present action by filing a writ of summons on November 18, 2005. On January 6, 2006, Aramark filed for and the trial court granted a rule for the Officers to file a complaint within twenty days. When they failed to file a complaint within that time frame, Aramark filed for a judgment of non pros. On March 13, 2006, the Officers filed a petition for relief from judgment of non pros to re-open the judgment, to which they attached a proposed complaint. Count I of the proposed complaint alleged negligence against all of the defendants and Count II alleged intentional misrepresentation against only the County Officials. The Officers also sought compensatory and punitive damages, as well as attorney's fees. On June 20, 2007, the trial court entered an order granting the Officers' petition for relief from judgment of non pros.

On May 25, 2006, the County and the individual County Officials filed preliminary objections in the nature of a demurrer to both counts of the complaint. In an opinion and order dated November 1, 2006, the trial court granted the demurrer with respect to Count I of the initial complaint and dismissed the negligence claim as to the County and the individual County Officials. The trial court relied upon the

principle of exclusivity whereby a plaintiff may only recover under the Workers' Compensation Act for injuries suffered in the course of his employment due to his employer's negligence. *See* Section 303 of the Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §481. Our Supreme Court has repeatedly recognized this principle, stating:

> By virtue of the [Workers'] Compensation Act, an employee's common law right to damages for injuries suffered in the course of his employment as a result of his employer's negligence is completely surrendered in exchange for the exclusive statutory right of the employee to compensation for all such injuries, regardless of negligence, and the employer's liability as a tortfeasor under the law of negligence for injuries to his employee is abrogated.

*Kohler v. McCrory Stores*, 532 Pa. 130 136, 615 A.2d 27, 30 (1992) (quoting *Socha v. Metz*, 385 Pa. 632, 637, 123 A.2d 837, 839 (1956)). However, the trial court denied the demurrer to Count II, intentional misrepresentation. The Officers did not appeal the trial court's order and, therefore, waived their right to pursue any negligence claims against the County and the individual County Officials.

On February 26, 2008, the Officers filed their second amended complaint, again asserting causes of action in negligence against all of the defendants and intentional misrepresentation against the County and individual County Officials. The trial court issued a scheduling order imposing, *inter alia*, the following: March 30, 2009, as the deadline for Appellants' expert reports; and May 29, 2009, as the deadline for filing dispositive motions.

Both Aramark and the County defendants filed motions for summary judgment, which the trial court granted in an order dated March 1, 2010. The trial court noted that in its previous opinion and order dated November 1, 2006, the negligence claim against the County and the County Officials was dismissed; therefore, the only remaining claim against these defendants was that of intentional misrepresentation. The trial court indicated that pursuant to the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§8541-42, the County cannot be held liable for the intentional torts of its employees. Also, the Officers could not establish any of the elements necessary to support their claim of intentional misrepresentation against the County Officials because they failed to identify in their depositions any misrepresentations made by the County Officials regarding the mold in the Prison. Therefore, the Officers could not prevail on their claims of intentional misrepresentation, and the County and the individual County Officials were entitled to judgment as a matter of law.

As to the negligence claim against Aramark, the trial court noted that Aramark provided food preparation and service at the Prison and that its duties and responsibilities were limited to those specifically set forth in its contract with the County. Under this contract, the County retained responsibility for repairs and maintenance of the Prison and its ventilation, water and sewer services. In addition, the mold infestation pre-dated Aramark's services contract with the Prison, which was not signed by the parties until January 14, 2004. Therefore, there was no basis for finding that Aramark owed the Officers any duty to undertake the remediation of mold in the Prison walls and ceilings. The trial court also noted that after more than four years of discovery, the Officers had not identified a trial expert or produced an

expert opinion linking their alleged medical conditions to mold exposure, nor were they able to demonstrate that the type of mold they were exposed to was of the type and in sufficient quantity to cause any harm. In their depositions, the Officers stated that some of their doctors indicated it was a possibility that their illnesses and injuries were caused by mold exposure, not that it was in fact the cause, and none of the doctors were willing to put these opinions in writing. Because the Officers were unable to establish either a breach of duty by Aramark or proximate causation, the trial court found they could not prevail on their negligence claim and Aramark was entitled to judgment as a matter of law.

The trial court also noted that the Officers' response to the motions for summary judgment failed to address the merits of these motions; rather, they merely contended that the motions were premature. However, non-moving parties may not rest upon the pleadings; they must set forth specific facts demonstrating that there are genuine issues for trial. In addition, the trial court denied the Officers' request for additional discovery as the matter had been pending for over four years, the request was made well outside the case management deadlines, and all of the available Officers had already been deposed. The trial court again stressed that the admissions made by the Officers in these depositions demonstrated that they could not prevail on their claims, regardless of how much additional time they were given. Finally, the trial court found that the federal litigation regarding alleged retaliatory conduct that had been transferred from the United States District Court for the Eastern District of Pennsylvania was separate and distinct from the instant case and could proceed on its

own without reopening the pleadings in this action. The Officers filed a Motion for Reconsideration, which was not ruled upon as they later filed the instant appeal.[3]

## III. Timing of Summary Judgment

The Officers raise several arguments on appeal.[4] First, they allege the trial court committed an abuse of discretion or error of law by entering summary judgment on the record before it when discovery was not yet complete. According to the Officers, several depositions they requested were not scheduled and only one of the individual County Officials named in the action was produced for deposition. They also allege that the proffered corporate designee of Aramark testified that his sole knowledge of the mold infestation at the Prison was based upon conversations with his legal counsel. The Officers claim Aramark needed to provide a new designee with personal knowledge of the situation and his or her deposition needed to be taken before summary judgment could even be considered. Finally, they contend that there was an insufficient factual record in this case upon which a trial expert could issue a report. We disagree.

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[3] The Officers originally filed their appeal with the Superior Court, and it was transferred to this Court pursuant to Pa. R.A.P. 751(b).

[4] Our review of a trial court order granting summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. *Manley v. Fitzgerald*, 997 A.2d 1235, 1238 n.2 (Pa. Cmwlth. 2010). Summary judgment may only be granted when, after examining the record in the light most favorable to the non-moving party, the record clearly demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The Officers initiated this lawsuit in November of 2005. Five years later, they still have not identified a trial expert or produced an expert report, even though the deadline imposed by the trial court for producing such a report was March 30, 2009. The trial court initially entered a judgment of non pros for Aramark after the Officers failed to comply with a court order and file a complaint within the specified time frame. The trial court also extended the initial discovery deadlines on one occasion and it was only *after* these new deadlines had passed that the Officers filed a motion requesting yet another extension. The Officers' claim that summary judgment was not appropriate because discovery was not yet complete is without merit given their own lack of diligence in pursuing their claims.

Contrary to the Officers' argument, the trial court did not grant summary judgment based upon a technicality or procedural misstep, nor did it do so merely because the action languished on the docket for years. Rather, the trial court granted summary judgment after all of the discovery deadlines had passed, the relevant pleadings were closed, and after fully considering all of the proffered evidence, including the Officers' own depositions. As will be discussed below, it is clear from these depositions that further discovery will not create material issues of fact necessary to warrant a trial. In addition, the Officers' response to the motions for summary judgment failed to address the merits of the motions, simply asserting that they were premature. It is well established that non-moving parties may not rest upon mere allegations or denials of the pleadings; rather, they must set forth specific facts demonstrating that there are indeed genuine issues for trial. *See* Pa. R.C.P. 1035.3. Given all of these reasons, summary judgment was not premature in this case.

## IV. The Officers' Claims

When considering a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and may only grant summary judgment when the right to relief is clear and free from doubt. *Firetree, Ltd. v. Department of General Services*, 978 A.2d 1067, 1071 n.5 (Pa. Cmwlth. 2009) (citing *Fine v. Checcio*, 582 Pa. 253, 265, 870 A.2d 850, 857 (2005)). The Officers contend that the trial court committed an error of law or abuse of discretion by ignoring portions of the record and by failing to view the record in the light most favorable to them as the non-moving party. We will analyze this argument by examining the claims against each of the defendants in turn.

### A. Intentional Misrepresentation Claim Against the County Officials

In order to maintain a cause of action for intentional or fraudulent misrepresentation, a plaintiff must establish the following elements:

> (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result.

*Martin v. Lancaster Battery Company, Inc.*, 530 Pa. 11, 19, 606 A.2d 444, 448 (1992). The Officers claim that their deposition testimony establishes verbal misrepresentations made by the County Officials and that these misrepresentations were reduced to writing and posted in the prison. In their brief to this Court, the

Officers note that Officer Todaro testified in his deposition that he repeatedly brought the mold problem and his health concerns to the attention of Mr. Smith and Mr. Buskirk, but he was told to continue working where he was stationed. R.R. at 529a-530a. However, this does not constitute a misrepresentation regarding the alleged mold problem at the Prison or an opinion regarding the effects of mold exposure on those working throughout the Prison. The Officers also point to Officer Todaro's testimony that he brought the mold problem to the attention of several Lieutenants working at the Prison, but no action was taken. R.R. at 546a. Again, an alleged lack of action does not constitute a misrepresentation or fraudulent utterance thereof, and the Lieutenants were not named as defendants in this action. Officer Ferraro testified that John McGeehan, a Prison administrator, assured him that it was safe to work in the Prison. R.R. at 572a. However, John McGeehan is not one of the County Officials named as a defendant in this case.

Our review of the record reveals that none of the Officers identified any specific misrepresentations made about the mold, most of the Officers never actually spoke with the County Officials named as defendants in this case and brought the action against them merely because they believed these officials were within the "chain of command" at the Prison, and the Officers failed to identify a trial expert let alone produce an expert report regarding causation.

Regarding the alleged misrepresentations, Officer Ferraro testified that he did not know Mr. Reibman and never spoke to or corresponded with him (R.R. at 78a); Mr. Smith and Mr. Hoke never told him anything he thought was false (R.R. at 88a); and he never discussed the mold situation at the Prison with Mr. Buskirk. *Id.*

Officer Schrader admitted in his deposition that Mr. Reibman, Mr. Smith, and Mr. Hoke never told him anything that he believed to be untruthful (R.R. at 121a), and he never spoke to any of them regarding the mold situation or his alleged injuries. R.R. at 119a, 121a, 126a. Officer Schrader stated that he brought a claim against Mr. Reibman because he was in charge of the county (R.R. at 119a) and against Mr. Hoke because he was in charge of the Prison for a period of time. R.R. at 121a. While he claims that Mr. Buskirk's statement that he was fixing the mold problem was untruthful, he also admits that the County fixed the showers and remediated the mold in the kitchen. *Id.* Officer Sikorsky testified that he never discussed the mold issue with Mr. Reibman or Mr. Hoke. R.R. at 155a. He stated that he thinks he spoke to Mr. Smith about having trouble breathing due to the mold, but he does not recall Mr. Smith's response. *Id.* He also stated that he believes he spoke to Mr. Buskirk about his eyes watering and not being able to breathe correctly because of the mold, but he does not recall Mr. Buskirk saying much about these complaints. *Id.* Officer Sikorsky stated that he filed the complaint against the County Officials because they were in charge and should have fixed the problem or made people aware. R.R. at 159a. Officer Todaro testified that he does not remember if he ever spoke to Mr. Reibman about his concerns over the mold at the Prison and that he never wrote to him regarding this issue. R.R. at 182a. He testified that he had a few conversations with Mr. Smith about the mold problem and his health issues, but admitted that Mr. Smith did not respond and never made any statements to him about these issues. R.R. 184-185a. Officer Todaro stated that he never told Mr. Hoke that he was suffering from injuries due to exposure to mold, but when he spoke to Mr. Hoke about the mold problem in general within the Prison, "he was more serious about it." R.R. at 190a. Officer Quinter testified that he never spoke to Mr. Reibman about his

concerns regarding the mold within the Prison and he did not remember speaking with Mr. Hoke about the issue. R.R. at 228a. He stated that when he brought up the mold situation with Mr. Smith and Mr. Buskirk, neither of them gave much of a response. *Id.* None of these statements amount to a misrepresentation regarding the presence of mold within the Prison or the potential safety hazards of repeated exposure to mold. Rather, it appears that these County Officials were singled out because they were believed to have the authority to fix the mold problem within the Prison and the Officers were not satisfied with how the County handled the alleged mold infestation.

Even if the Officers were able to demonstrate a misrepresentation was actually made, they cannot establish the final element in proving their claim – that their injuries were the proximate result of the misrepresentation. The Officers claim they suffer from various physical injuries and ailments, including fatigue, anxiety, depression, sleep disturbance, diabetes, and asthma. While the Officers claim that several of their doctors and psychologists indicated that their injuries and ailments could *possibly* be the result of mold exposure in the workplace, none of them were willing to definitively state that this was the cause or to put such an opinion in writing. R.R. at 74-76a; 115-116a; 156a; 181a; 205-206a. Five years after this lawsuit was instituted, the Officers still have not identified a trial expert or produced a report attributing their alleged ailments and injuries to exposure to toxic mold within the Prison. The only evidence regarding their alleged exposure comes from the Officers' own deposition testimony. There are no tests, photographs, or sample studies of the mold, nor is there any evidence that the mold within the Prison was of the type, sufficient quantity or in a form which would cause harm. The only report

the Officers' supplied to the trial court was a draft report written by John J. Shane, M.D. (Dr. Shane), who they note will not be called as a testifying witness at trial. Dr. Shane admittedly never examined, met with, or spoke to any of the Officers, and he never visited the Prison or obtained any samples, tests, or even photographs of the mold in question. In addition, this draft report was only submitted to the trial court after summary judgment was entered and the Officers moved for reconsideration. The Officers cannot establish even a *prima facie* case without expert testimony; therefore, the County Officials were entitled to summary judgment. *See Wolloch v. Aiken*, 572 Pa. 335, 341, 815 A.2d 594, 598 (2002).

**B. Negligence Claim Against Aramark**

The elements necessary to maintain an action in negligence are clearly established as "a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; a failure to conform to the standard of conduct; a causal connection between the conduct and the resulting injury and actual loss or damage resulting to the interests of another." *Morena v. South Hills Health System*, 501 Pa. 634, 642, 462 A.2d 680, 684 (1983). The Officers contend that the testimony of Jason Dale Morgan (Mr. Morgan), Aramark's corporate designee, identified portions of Aramark's contract with the County which placed a duty upon Aramark to maintain the food service area of the Prison free of toxins. In particular, the contract states it is the intention of the parties "that the public health, safety and welfare be protected and furthered by this agreement," (R.R. at 652a) and that it was Aramark's responsibility "to routinely provide cleaning and housekeeping of the food service, preparation service, and storage area and . . . maintain standards of sanitation required by state and local regulations." R.R. at 653a. We agree with the trial court

that the Officers' negligence claim must fail because they cannot establish the existence of a duty by Aramark to the Officers or breach of that duty.

First and foremost, the contract between the County and Aramark did not go into effect until January 14, 2004. R.R. at 303a. The Officers admit that the mold condition in the prison existed prior to Aramark's contractual relationship with the Prison. The Officers' complaint and deposition testimony states that the mold was caused by water leaking through the ceiling from shower stalls located above the dining hall and food preparation area at some time substantially prior to November of 2003. Therefore, it is clear that Aramark was not the source of the mold problem. In addition, Aramark's duties and responsibilities were set forth in the contract as "furnishing of required management and supervision, as well as certain foods and supplies, and chemicals necessary to provide food services for the inmates and staff at the Prison." The contract clearly indicated that the County retained responsibility for maintenance and repairs of the Prison's buildings, ventilation, water and sewer service, and the removal of all trash and garbage. Aramark did not have the authority or duty to fix the leaking showers or any damage caused by alleged defects in the Prison's plumbing, nor did it exercise any authority or control over the shower area of the Prison. Aramark's duties and responsibilities were constrained by the narrow scope of its contract with the County and the general welfare clause and duty to provide basic cleaning and housekeeping services did not impose upon Aramark a duty to remediate the mold found within the Prison walls and ceilings.

## V. Transfer of Federal Claims

Finally, the Officers argue that summary judgment was premature as the pleadings need to remain open to reflect the transfer of "related" federal claims. This refers to federal claims of retaliation for filing of the underlying lawsuit which several of the Officers lodged in the United States District Court for the Eastern District of Pennsylvania. Contrary to the Officers' arguments, the parties did *not* agree that the federal retaliation claims should be consolidated with this action and the federal court order did *not* consolidate the matters. The joint stipulation merely states that the parties agreed that the case should be transferred to the trial court for resolution, and the court order signed by Judge Juan R. Sanchez simply states that the case "is transferred to the Northampton County Court of Common Pleas." The trial court found that the retaliation claims are discrete from the instant case and can proceed separately without reopening the pleadings. We will not disturb this ruling.

For all of the foregoing reasons, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

Judge Simpson did not participate in the decision in this case.

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**O R D E R**

AND NOW, this 5th day of January, 2011, the decision of the Court of Common Pleas of Northampton County, dated March 1, 2010, is affirmed.

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DAN PELLEGRINI, JUDGE