Smith v Adagio Condominium
2018 NY Slip Op 33338(U)
December 20, 2018
Supreme Court, New York County
Docket Number: 152533/2015
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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GREGORY SMITH, Index No.: 152533/2015

Plaintiff,

-against-

ADAGIO CONDOMINIUM, ALGIN MANAGEMENT CO., LLC, WEST END ENTERPRISES, LLC, SOLSTICE RESIDENTIAL GROUP, LLC, VJB CONSTRUCTION CORP., PARAMOUNT PLUMBING CO. OF NEW YORK, INC. and MIN KYUNG KWON,

Defendants.

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WEST END ENTERPRISES, LLC, Third-Party Index No.: 595245/2016

Third-Party Plaintiff,

-against-

VJB CONSTRUCTION CORP. and PARAMOUNT PLUMBING CO. OF NEW YORK, INC.,

Third-Party Defendants.

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Kalish, J.:

Motion sequence numbers 003, 004 and 005 are hereby consolidated for disposition.

In this toxic tort action, plaintiff Gregory Smith allegedly sustained personal injuries caused by toxic gas that permeated throughout his apartment at 243 West 60th Street, Apt. 7-C, New York, New York (the Unit), as a result of a disconnected wastewater drain located behind his kitchen wall.

In motion sequence number 003, defendant/third-party plaintiff West End Enterprises, LLC (West End) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint

and all cross claims and counterclaims against it, or, in the alternative, for summary judgment in its favor on its third-party claim for contractual indemnification against defendant Paramount Plumbing Co. of New York (Paramount).

In motion sequence number 004, defendant Min Kyung Kwon (Kwon) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against her.

In motion sequence number 005, Paramount moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, the third-party complaint and all cross claims against it.

Defendants Adagio Condominium (Adagio), Algin Management Co., LLC (Algin) and Solstice Residential Group, LLC (Solstice) (collectively, the Adagio defendants) cross-move, pursuant to CPLR 3212, for summary judgment in their favor on the issue of causation.

Defendant/third-party defendant VJB Construction Corp. (VJB) has not answered or appeared in the action.

BACKGROUND

At the time of his alleged exposure, plaintiff was a tenant in a luxury condominium building, known as The Adagio, which began development around 2005/2006 by West End (the Building) (the Project). West End hired VJB to serve as the construction manager on the Project. In turn, VJB subcontracted the Project's plumbing installation work to Paramount.

In addition, Adagio was the condominium association for the Building, and Solstice was the Building's managing agent. Solstice took over that role from Algin. West End, the Building's developer and the Unit's sponsor, sold the Unit to Kwon in 2008, at which point West End's association with the Unit ended.

Plaintiff claims that a disconnected wastewater drain pipe, located behind the kitchen

wall of the Unit, resulted in noxious odors and toxic gas permeating throughout the Unit between June 2012 and February 2014. As a result, he claims personal injury, including decreased mental acuity, erectile dysfunction, memory loss, mild cognitive impairment, sleep apnea, vertigo, hearing loss and elevated mercury and arsenic levels in his blood.

It should be noted that the New York City Department of Buildings'(the DOB) reports (the DOB Reports) indicate that the Building's seventh floor water and sanitary piping passed inspection on November 26, 2008 and March 9, 2009. Nevertheless, at the October 15, 2018 oral argument, it was undisputed that the "finish" inspections would only have been of the space after the wall had already been sealed up. (Tr at 65-66.)

Deposition Testimony of Bennett Schonfeld (West End's Senior Executive)

Bennett Schonfeld testified that he is West End's senior executive and authorized representative and is the senior operations executive for Algin, a real estate management company. He explained that Algin manages various rental apartments in Manhattan and Queens and that it managed the Unit from its inception until February of 2012. He further explained that West End was the developer and sponsor of the Building. West End hired VJB to serve as the construction manager for the Project. As construction manager, VJB employed various construction supervisors, oversaw the work of the subcontractors and scheduled the work. Schonfeld testified that VJB and West End hired Paramount to install the plumbing in the Building.

Schonfeld testified that construction on the Building began in late 2005 or early 2006. Built as "a ground-up building," it was completed in November 2008 (Schonfeld tr at 14). Thereafter, West End sold the Building's individual condominium units and residents began

moving into the Building. At the time, Algin resident manager Alberto Depaz oversaw the Building, following up on punch-list issues and dealing with basic problems that came up in the apartments "like a building super would" (*id.* at 32).

Upon the sale of the Building's units, West End was involved for a short time with the punch-list complaints. Thereafter, Algin took care of any necessary repairs as managing agent. Once the items were completed, West End was no longer involved in the units in any way.

Schonfeld also testified that Adagio, the condominium association, was responsible for maintaining and repairing the common elements of the Building. As such, anything located behind the walls or affecting the Building's systems, such as the pipe at issue in this case, is the responsibility of Adagio. He noted that Kwon did not play any role in installing or maintaining the pipes located behind the walls of the Unit.

Plaintiff's Deposition Testimony

Plaintiff testified that he lived in the Unit from June 2012 until February 2014, during which time he was writing a book. From June 2012 to October 2012, plaintiff was present in the apartment for about 18 to 20 hours a day. During this time, plaintiff noticed a foul smell permeating throughout his apartment in varying amounts and at different times. Plaintiff complained to Kwon, the owner of the Unit, about the odor. Kwon, who was aware of the problem because a previous tenant had complained about it, advised plaintiff to try using an air freshener to mask the odor.

Plaintiff also complained about the odor to the Building's superintendent, a man named "Kenny [Ndoci]," who came to the Unit, acknowledged the offending smell and then informed plaintiff that the Unit's previous owner had also complained about it (plaintiff's tr at 43). Kenny

opined that the smell was coming from the dishwasher and suggested that plaintiff try using an air freshener. Plaintiff also complained to the Building's doormen, Solstice, and Adagio. Plaintiff maintained that, at one point, he asked that Solstice request an environmental engineer to inspect the Unit.

Thereafter, periodically, when plaintiff noticed an odor, he would reach out to Kenny, and then Kenny would "come in and check the smell again" (*id.* at 49). As Kenny and Kwon both "reaffirmed . . . that the smell had been checked out and [it] was a normal dishwasher smell," plaintiff decided to remain living in the Unit (*id.* at 55).

Plaintiff testified that one evening in October 2013, as he sat at his dining room table, he noticed the smell was particularly strong, so he walked around the Unit trying to locate its source. He found that the smell was particular strong near a certain light switch. When he removed the light switch's wall plate, "[a]n extremely strong amount of very bad-smelling gas came - burst out of the hole that was left after I removed the switch" (*id.* at 70). Later, an environmental engineer came to the Unit to inspect the problem. The wall around the light switch was opened up and a loose and disconnected pipe was revealed. It was plaintiff's understanding that the pipe was used as a sewage pipe for the Building. The pipe was repaired some days later.

Deposition Testimony of Kole (Kenny) Ndoci (the Building's Superintendent)

Kole (Kenny) Ndoci testified that he has lived and worked in the Building since 2009. In June 2009, various contractors and subcontractors, including plumbers, electricians and painters, were still working on"punch list" items and "finishing up" (Ndoci tr at 19). This work continued for about six months to a year. Ndoci explained that Adagio and Algin originally hired him to be the Building's superintendent. By the time that plaintiff had moved into the Building, Algin was

no longer the Building's manager, as Solstice had taken over the role. Ndoci asserted that, although he would periodically repair plumbing located outside of the walls, he never repaired any pipes located behind the walls of the units.

Ndoci further testified that, in 2011, Kwon's earlier tenant, a man named "Evan," complained a few times about smelling an odor in the Unit (Ndoci tr at 25). Ndoci advised Adagio and Algin about the complaint, and then, believing that the smell originated from the dishwasher, he advised Kwon to hire "a dishwasher guy" to investigate (*id.* at 33). When plaintiff moved into the Unit, he also complained about foul-smelling odors there.

Ndoci explained that the source of the smell was discovered in the fall of 2013, when the wall in the Unit's kitchen was opened up. At this time, it was determined that a pipe, which led through all of the units on the Building's C-line, was disconnected. Ndoci then hired a plumber to repair the pipe. Kwon was not charged for the cost of the repair.

Deposition Testimony of Frank Massaro (Paramount's Superintendent)

Frank Massaro testified that he was Paramount's superintendent on the day of the accident and that VJB hired Paramount to install all of the plumbing for the Project. During the construction of the Building, Massaro visited the job site approximately three or four times a week to "make sure the job was going well" (Massaro tr at 14). Massaro also monitored Paramount's work on the Project. Paramount's work included installing the pipe at issue in this case by connecting it to another pipe using coupling and screws. Massaro testified that "nobody else from the building had that responsibility" (*id.* at 34-35). Massaro explained that the pipe at issue was a vent pipe, which "releases sewer gases," and that it would have been "hidden behind the wall" (*id.* at 20, 86).

When Massaro was shown a photograph of the subject pipe, he noted that said pipe in the photograph had yellow paint on it, and "[t]hat [yellow paint] is not used by [Paramount]" (*id.* at 36).

Massaro also testified that Paramount performed its work to the satisfaction of VJB and that it was paid for its work on the Project. In addition, neither VJB nor anyone else ever complained about Paramount's plumbing work on the Project. Further, the DOB inspected and approved Paramount's work on the seventh floor, where the Unit was located. He maintained that all vent pipes would have to have been "connected" in order to have passed "finished inspection" (*id.* at 50). He also noted that the subject wall would not have been sealed closed at the time of the DOB's inspection.

Deposition Testimony of Min Kyung Kwon (the Unit's Owner)

Kwon testified that she owned the Unit with her husband at the time of the plaintiff's tenancy. She personally moved into the Unit in 2009 and then out of it in October 2011. Prior to renting the Unit to plaintiff, she rented it to another tenant for four months. The first tenant complained to her about a smell in the Unit, which he thought came from the dishwasher. Thereafter, the manufacturer of the dishwasher came out and inspected it and found nothing wrong with it. Kwon testified that, while she lived in the Unit, she smelled an odor "[v]ery rarely" (Kwon tr at 17). When she asked Ndoci about the odor, he told her that he thought the smell was coming from the dishwasher and recommended a particular brand of dishwashing detergent for her to use. After that, Kwon no longer smelled the odor.

Kwon also testified that Ndoci investigated the subject smell from June 2012 to August 2013 and that she had also contacted the Building's board members about getting an

environmental engineer to investigate its source. Kwon finally learned about the source of the smell after plaintiff sent her a photograph of the subject pipe inside the kitchen wall of the Unit.

Kwon explained that, with the exception of complaining about smells in the Unit, the plaintiff had always seemed happy with the apartment. Overall, she was on friendly terms with plaintiff, and he rarely mentioned the odor. When plaintiff initially complained, Kwon told him that the fact that "the smell comes and goes" indicates that the dishwasher was not draining properly. She then suggested that plaintiff "[t]ry air freshener" (*id.* at 32). Kwon testified that the odor issue did not really escalate until the very end of plaintiff's tenancy. When plaintiff moved out of the Unit in February 2014, he wanted to be compensated for "two years of free rent" or "one hundred thousand dollars" (*id.* at 34-35).

Deposition Testimony of Julie Sagoskin (Plaintiff's Girlfriend)

Julie Sagoskin testified that, during the course of her eleven-month relationship with plaintiff, she slept in the Unit approximately twenty-four times and never noticed a smell. In addition, she never developed any health issues as a result of being in the Unit.

The Condominium's By-Laws

The condominium's by-laws (the By-laws) provide that the Building's condominium association is responsible for maintaining and repairing the Building's common elements. Specifically, the By-laws state, in pertinent part, as follows:

> "Section 5.1 Maintenance and Repairs.
>
> (A) Except as otherwise provided in the Declaration or these By-laws, all painting, decorating, maintenance, repairs and replacement, whether structural or non-structural, ordinary or extraordinary:
>
> . . .

> (ii) in or to the General Common Elements . . . shall be performed by the Condominium Board as a Common Expense"

(Kwon's notice of motion, exhibit H, the By-laws).

In the condominium's declaration (the Declaration), it is noted that the general common elements of the condominium include, in pertinent part, as follows:

> "installations for utilities and other services which benefit the entire Building, including but not limited to: conduits for plumbing, electricity . . . water, sewage, drainage, waste piping . . . heat and ventilation, if any; and all pipes, wires, vents, conduits, flues . . . and other things used in connection with any of the foregoing, whether located in common areas or in a Unit"

(Kwon's notice of motion, exhibit I, the Declaration).

Ecotech's Odor Inspection

On October 29, 2013, non-party Ecotech Environmental International, Inc. (Ecotech) conducted an odor investigation and report on plaintiff's behalf (the Ecotech Report). When Ecotech opened the Unit's kitchen wall to inspect the plumbing behind it, it found that "the vent associated with the sink/dishwasher was disconnected, thereby allowing the release of sewer gases" (the Adagio defendants' notice of motion, exhibit H, the Ecotech Report). In addition, "[n]o detectable levels of carbon monoxide (CO), lower explosive limit (LEL), [VOC's] or hydrogen sulfide . . . were identified during testing conducted on 10/29/13" (*id.*). The Ecotech Report also stated that

> "Sampling for airborne sulfur gases was performed via ASTM Standard D5504 over an approximate 8-hour period. Only 1 of the 5 test parameters revealed detectable concentrations. Specifically, carbonyl sulfide was detected with a result of 41 ug/m3. According to the Clean Air Act Amendment of 1990, carbonyl sulfide is listed as a hazardous air pollutant; however, the EPA has no information regarding the measurement of personal exposure to carbonyl sulfide"

(*id.* at 2).

Ecotech concluded that:

> "sewer odors from the disconnected sink/dishwasher vent line have been the cause of the objectionable odors. Instrumental and analytical testing revealed detectable levels of TVOC and carbonyl sulfide but no significantly elevated concentrations for any of the parameters evaluated"

(*id.* at 3). Ecotech recommended that the sink/dishwasher vent line be repaired.

Plaintiff's Testimony Regarding His Medical History

Plaintiff testified that in October 2012, he felt extremely fatigued. Accordingly, in November of 2012, he made a visit to Dr. Alan Dechiario, a general internist. Plaintiff stated that, in 2000 or 2001, he was diagnosed with non-alcoholic fatty liver disease, of which fatigue was a main symptom. Plaintiff maintained that he controlled the disease with weight management, exercise, and eating healthy food. Plaintiff also testified that he gained approximately 20 pounds while living in the Unit and that his diet during that period consisted of mostly pre-packaged and take-out foods. Dr. Dechiario advised him to reduce his consumption of fish because of high mercury levels in his blood.

During the time that plaintiff lived in the Unit, he saw multiple other doctors, none of whom diagnosed him with anything related to the subject incident. To that effect, plaintiff was diagnosed with reduced vestibular response in one ear and sleep apnea. A neurologist, Dr. Roberts, examined plaintiff and, after conducting an MRI, concluded that everything was "normal" (plaintiff's tr at 118-120). Only Dr. Dechiario, who saw him just two or three times, purportedly told plaintiff that his ailments might be related to the odors that he was inhaling while living in the Unit. That said, when plaintiff later returned to Dr. Roberts and told him of Dr. Dechiario's conclusions regarding the cause of his symptoms, Dr. Roberts said that although

"he's not an expert in the field . . . it sounds right to him" (*id.* at 122).

Plaintiff also maintained that he was never prescribed any medications for any of his symptoms. Plaintiff further maintained that the symptoms never affected his ability to do his work. In addition, he never sought treatment for any of the medical issues allegedly caused by the subject smells. While plaintiff suffered from hand trembling and dizziness, these problems had since resolved themselves. Plaintiff also noted that his fatigue was lessening, though he sometimes could not drive because of it.

Dr. Alan A. Dechiario's Medical Summary

In his summary of plaintiff's care, submitted as exhibit A to plaintiff's opposition papers (Dr. Dechiario's Medical Summary), Dr. Dechiario, an internist, stated that plaintiff first came to see him on December 5, 2012, at which time "he complained of fatigue, drowsiness, dizziness, and decrease in mental acuity" (plaintiff's opposition to all motions, exhibit A, Dr. Dechiario's Medical Summary). At that time, blood tests were performed and plaintiff was given referrals to a neurologist and an ear, nose and throat doctor. Plaintiff returned to Dr. Dechiario for a complete checkup on January 7, 2013, "at which time his symptoms were ongoing" (*id.*). Plaintiff also had follow-up appointments on January 31, 2013 and on March 12, 2013, at which time he underwent a polysomnography. The polysomnography showed that plaintiff suffered from supine obstructive sleep apnea, which resolved itself when plaintiff was "in the lateral sleep position" (*id.*).

Dr. Dechiario stated that, by the time that he saw plaintiff again on November 21, 2013, plaintiff had undergone a number of medical tests, wherein it was noted that his sleep apnea symptoms did not improve with the use of a CPAP system. Around this same time, plaintiff

"gave a history of a strong smell suggestive of sewage in his apartment and [told him] that he had located the origin of the smell . . . and found an open sewage pipe, which had not been closed" (*id.*). Plaintiff told Dr. Dechiario that environmental testing in the Unit had been performed and that the disconnected pipe had since been reconnected and sealed. Plaintiff also told Dr. Dechiario that, once the pipe was sealed, he immediately began to feel better, with more energy, memory and fewer headaches.

Dr. Dechiario further stated that the aforementioned medical testing revealed, among other things, that plaintiff had "low levels of cyanide, normal levels of carboxyhemoglobin, normal levels of lead, worsened ongoing liver function abnormalities, normal levels of copper, and elevated mercury levels at 30 . . . [and] testing for autoimmune hepatitis was negative" (*id.*). Dr. Dechiario opined that plaintiff's elevated mercury levels could have been due to his intake of fish. In addition, plaintiff's liver function abnormalities remained elevated, most likely due to non-alcoholic steatohepatitis, so Dr. Dechiario recommended weight loss. When plaintiff saw Dr. Dechiario again in January of 2015, "[h]e complained of decrease in erections and decrease in libido" (*id.*). From 2015 to 2017, Dr. Dechiario attributed plaintiff's symptoms of fatigue at the time to ongoing obstructive sleep apnea and attributed plaintiff's symptoms of weakness to a decrease in exercise and a worsening of diet. Dr. Dechiario also noted that plaintiff's liver functions remained abnormal throughout his contact with his patient.

At the end of his report, Dr. Dechiario offers his opinion regarding plaintiff's alleged exposure to carbonyl sulfide. In summary, Dr. Dechiario stated that he "felt that it was unlikely that his steatohepatitis is causing his significant fatigue and that based on the timing of his symptoms and their improvement, once the pipe was closed, that it was more likely than not that

the exposure to Carbonyl Sulfide was the cause of his presenting symptoms."

Documents Submitted by Plaintiff Regarding Carbonyl Sulfide

Plaintiff put forth, among other things, an article from the National Institute of Health's website about the human health effects associated with exposure to carbonyl sulfide. The article states that "[c]oncentrations of 50 to 100 ppm are associated with mild toxicity manifesting as respiratory tract irritation while concentrations greater than 500 ppm are associated with loss of consciousness or death" (plaintiff's opposition, exhibit C, TOXNET article). It explained that "low to moderately high vapor concentrations" of carbonyl sulfide in the air may result in conjunctivitis in the eyes, skin pain, nausea, vomiting, diarrhea, vertigo, headache, amnesia confusion and muscle cramps (*id.*). If exposed to "very high vapor concentrations," a person might suddenly collapse, suffer cardiac dilatation, slow pulse or amnesia. That said, even at this high level of exposure, "[r]ecovery is eventually complete in most nonfatal cases" (*id.*).

Plaintiff also annexed other industry-related facts sheets for carbonyl sulfide.

Notably, plaintiff annexes a public review draft of a document from California's Office of Environmental Health Hazard Assessment ("OEHHA") dated October 2014 and titled "Carbonyl Sulfide Reference Exposure Levels: Technical Support Document for the Derivation of Noncancer Reference Exposure Levels" (*id.* at 34). For the purposes of the instant motion, the court will take judicial notice of the Final Report, dated February 2017 and published by the Air, Community, and Environmental Research Branch of the OEHHA, a subdivision of the California EPA (https://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/12-Carbonyl-Sulfide.pdf, last accessed December 20, 2018 [the OEHHA Report or the Report]; *see also* CPLR 4511 [b], *Kingsbrook Jewish Med. Ctr. V Allstate Ins. Co.*, 61 AD3d 13, 19 [2d Dept 2009]; *Crawford v*

Liz Claiborne, Inc., 45 AD3d 284, 284 n 1 [1st Dept 2007], *revd* on other grounds 11 NY3d 810 [2008]).

The Report's summary indicates that it "presents methodology reflecting applicable scientific knowledge and approaches . . . to develop the acute, 8-hour and chronic [Reference Exposure Levels] (RELs) for carbonyl sulfide presented []." The Report goes on to state that carbonyl sulfide "is classified as a California Toxic Air Contaminant [] and a federal hazardous air pollutant. Inhalation of carbonyl sulfide results in adverse health effects mainly in the central nervous system (CNS). The RELs are based on CNS effects. The scientific literature published through February 2015 was considered in the derivation of these values."

An REL is typically a recommended guideline for what should be the upper exposure limit of a person to some hazardous substance. The RELs in the Report were calculated based upon an analysis that accounted for multiple studies of exposure to carbonyl sulfide and the adverse effects observed thereafter depending on varying doses per unit of time. The Report indicates that carbonyl sulfide has both an 8-hour and chronic REL of 10 $\mu g/m^3$, which had the critical effect of CNS toxicity in male and female rats. The acute REL was determined to be 660 $\mu g/m^3$. A comparison 8-hour and chronic REL value was derived from certain unpublished literature as being 22 $\mu g/m^3$. The Report indicates that carbonyl sulfide is a severe neurotoxicant and that eight-hour or chronic exposure to it in excess of the indicated RELs poses a danger. In the animal studies used as a basis for the RELs, carbonyl sulfide caused inhibition of brain cytochrome oxidase activity, neurotoxicity and frank histopathological lesions in the brain of adult rats.

The Report states that carbonyl sulfide is an "odorless gas" and is "a component of

cigarette smoke and may occur at levels of 12 to 42 µg in the mainstream smoke from one unfiltered cigarette" . . . and is present in side-stream smoke at 3-13% of the amount in mainstream smoke." While acknowledging that "[d]ata on ambient levels of carbonyl sulfide are scarce, the Report indicates that the ambient concentration was reported in a range of 1.1-1.3 $\mu g/m^3$ at locations in Pennsylvania, Virginia, and Oklahoma and that its average worldwide atmospheric concentration is considered to be relatively constant at 1.2 $\mu g/m^3$. The highest reported seasonal variation of carbonyl sulfide was reported in Beijing, China, at 2.1 $\mu g/m^3$.

The Report further states that the level of carbonyl sulfide present in normal human breath averaged .23 $\mu g/m^3$ in one study involving 109 volunteers with normal liver function; the level doubled in 66 patients with either liver disease or hepatocellular injury.

The Report notes that 35 individuals exposed to carbonyl sulfide and other sulfide gases as a result of living near a crude oil refinery were tested for differences between 32 control participants as to neurophysiological function, verbal recall, overlearned memory, cognitive function, perceptual motor speed, and affective status. The study found statistically significant decrements in exposed subject neurophysiological function and significantly reduced psychomotor speed for certain tests. The exposed group also scored significantly higher for affective status issues (elevated anger, confusion, depression, tension-anxiety and fatigue). The Report noted that outside the refinery desulfurization unity, the measured 24-hour average carbonyl sulfide concentration ranged from 6.4 to 125.7 $\mu g/m^3$ over a five-year period.

The Defense Experts:

The Expert Affidavit of Sheldon H. Rabinovitz, PhD

In his affidavit, Sheldon H. Rabinovitz, PhD, a certified industrial hygienist and

toxicologist, stated that, after reviewing all documents and photographs,

> "Ecotech's single sample does not permit a statistical analysis to determine the validity of the results; Ecotech's finding of carbonyl sulfide at a very low concentration was not valid; there is no air sampling data showing the presence of any chemical concentrations significantly above ambient levels in the air which would have been inhaled by the occupants; and the continuous monitoring of VOC's did not identify the presence of any organic at a concentration that could cause transient or permanent adverse health effects"

(the Adagio defendants' notice of cross motion, exhibit I, Rabinovitz aff).

After detailing information regarding carbonyl sulfide and its effects, which he obtained from the National Library of Medicine's Hazardous Substance Data Base, Dr. Rabinovitz noted that "dose is the single most important factor in evaluating whether an alleged exposure caused a specific adverse effect," and that there was no evidence demonstrating that plaintiff "was exposed to a hazardous substance at any dangerous level or for an extended period of time" (*id.*). He ultimately concluded that "[p]laintiff was not exposed to carbonyl sulfide or any hazardous fumes or toxins in any quantifiable dose which could cause adverse health effects" (*id.*).

Expert Affidavit of Howard Sandler, M.D.

In his affidavit, Howard Sandler, M.D., a specialist in environmental medicine, stated that, in making his conclusions, he reviewed all relevant documents to this case. He opined that, to a reasonable degree of medical and scientific certainty, plaintiff was not exposed to sufficient dosages of any substances, including carbonyl sulfide, that could have potentially caused his health complaints.

Expert Affidavit of William Head, M.D.

In his affidavit, William Head, M.D. stated that he conducted neurological testing on plaintiff in order to determine whether plaintiff's health complaints arose out of being exposed to

noxious gases during his time in the Unit. Dr. Head did not find any objective evidence of any neurological or psychiatric condition relating to exposure to noxious gas from June 5, 2012 to February 2014. He noted that plaintiff had a history of chronic hepatitis, which was diagnosed on December 14, 2000, as well as a history of severe sleep apnea. He also stated that plaintiff's claims of fatigue and memory and concentration problems were not clinically apparent, as he seemed very intelligent and verbal and was writing books and lecturing regularly.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Timeliness of the Adagio Defendants' Cross Motion

As a threshold matter, the Adagio defendants concede that their cross motion on the issue of causation is untimely. The Adagio defendants argue that,

"[a] cross motion for summary judgment made after the expiration

> of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, although the Adagio's cross motion seeks relief on an issue which is "nearly identical" to those raised by defendants in their timely motions, this is not the proper analysis. As is relevant here, the Adagio defendants have cross-moved to join Paramount in motion sequence 005 in seeking dismissal of plaintiff's complaint. As the Appellate Division, First Department, has stated, "[a] cross motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (*Kershaw v Hospital For Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]).

As was the case in *Kershaw*, here, "[t]o the extent [the Adagio defendants'] motion was directed at the complaint, as opposed to any cross claims by [Paramount], and was not made returnable the same day as the original motion, it was not a cross motion as defined in CPLR 2215. The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party." Plaintiff is not a moving party. As such, the court will not consider the Adagio defendants' untimely cross motion pursuant to the rule articulate in *Brill v City of New York* (2 NY3d 648 [2004]; *see also Rubino v 330 Madison Co. LLC*, 150 AD3d 603 [1st Dept 2017]).

Whether Plaintiff's Exposure to Carbonyl Sulfide Caused His Injuries

Here, plaintiff alleges that, as a result of defendants' negligence, he was exposed to carbonyl sulfide while living and working in the Unit, and, as a result, he suffers from, inter alia, extreme fatigue, dizziness and decreased mental ability.

Initially, to establish causation, it must be shown that plaintiff was exposed to a toxin, that the toxin is capable of causing the particular illness and that plaintiff was exposed to sufficient levels fo the toxin to cause the alleged illness *Parker v Mobil Oil Corp.* (16 AD3d 648, 651 [2d Dept 2005], aff 7 NY3d 434 [2006]).

As set forth in *Parker*:

> "A scientifically-reliable methodology that is recommended by the World Health Organization and the National Academy of Sciences for drawing a sound conclusion as to the relationship between an individual's disease and a specific factor suspected of causing that disease entails a three-step process. This three-step process includes: (1) a determination of the plaintiff's level of exposure to the toxin in question, (2) from a review of the scientific literature, proof that the toxin is capable of producing the illness (i.e., the dose-response relationship) must be ascertained, and (3) establishment of specific causation by demonstrating the probability that the toxin caused the particular plaintiff's illness, which involves weighing the possibility of other causes of the illness. This three-step process has been acknowledged in numerous cases as generally accepted and reliable"

(*id. at* 651; *see also Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599, 601 [3d Dept 2007]; *Zaslowsky v J.M. Dennis Constr. Co. Corp.*, 26 AD3d 372, 373 [2d Dept 2006]). In *Parker* (supra), a case with similar circumstances, the Court determined that "the plaintiff's experts failed to make a causal connection, based upon a scientifically-reliable methodology, between the plaintiff's specific level of exposure to benzene in gasoline and his [illness]" (*id.* at 653). In doing so, the Court reasoned:

> "The plaintiff presented no evidence of the concentration level of benzene in the

> gasoline to which he was exposed. His experts failed to quantify his exposure in the typically utilized unit of measurement of parts per million factored against the duration of time to which the plaintiff was exposed, commonly referred to as a time-weighted average. Without any quantification of the plaintiff's level of exposure to benzene, required by the first part of the above described three-step process, the second part of that process, i.e., ascertaining the threshold level of benzene exposure which has been proven to cause AML (the parties do not dispute] that a certain level of benzene exposure has been proven to cause AML) loses any significance. Even if the plaintiff quantified his threshold level of exposure, he failed to quantify his own level of exposure, rendering it impossible to determine whether he exceeded the threshold. Various courts have rejected expert opinions that also failed to quantify the alleged level of exposure to the toxin in question or failed to account for the dose-response relationship"

(*Parker*, 16 AD3d at 652).

Plaintiff puts forth that, according to the Ecotech Report, carbonyl sulfide levels of 41 $\mu g/m^3$ were detected in the Unit. Based upon the OEHHA Report, the court finds that carbonyl sulfide is a toxin and that the level detected in the Unit was an amount well in excess of the 8-hour and chronic RELs adopted by the OEHHA. The court finds further that the studies cited in the Report, particularly the study finding a significant increase in fatigue and decrease in brain function in individuals exposed to similar levels of carbonyl sulfide as were detected in the Unit, are sufficient to meet the general causation test in *Parker* for the purposes of raising a genuine issue of material fact in the instant motions. The court finds further that the Report, enhanced by the differential diagnosis as reported by Dr. Dechiario in this particular case, which involved multiple visits by plaintiff to his treating doctor and other doctors and multiple tests conducted, is sufficient to meet the specific causation test in *Parker*, and sufficiently raises an issue of fact as to whether a cause-and-effect relationship exists between exposure to carbonyl sulfide and the kinds of injuries that plaintiff has alleged (*see Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 786). Unlike the insufficient differential diagnosis offered in *Cornell*, here, the court

finds that plaintiff has sufficiently "explain[ed] what other possible causes he ruled out or in" (*id.* at 785).

Movants' Duty to Plaintiff

As to West End's duty to plaintiff, plaintiff concedes that once West End, as the sponsor of the Unit, sold it to Kwon in 2008, it had no continuing role with respect to the Unit. In fact, at the time that plaintiff's claim arose, Adagio and Solstice were in control of the Building. While plaintiff argues that, since West End made walkthroughs of the Building during its construction, it somehow supervised and controlled Paramount's plumbing work, and, therefore, it is partially liable for plaintiff's alleged injuries, in fact, West End's walkthroughs were solely done for the purpose of checking on the progress of the work. The walkthroughs did not rise to the level of actual control over the means and methods of Paramount's plumbing work, such that it might be liable for plaintiff's injuries. As such, West End has shown prima facie entitlement to judgment as a matter of law dismissing the complaint as against it, and plaintiff fails to raise a genuine issue of material fact in response.

Kwon is also entitled to dismissal of the complaint and all other claims against her, because the pipe in question was located behind a wall, and therefore, as part of the Building's common elements, it was under the exclusive control of the Building's board of managers, and, pursuant to the By-laws, it was their responsibility to properly maintain it.

"Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property" (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]). "In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a claim arising from the condition or

operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers" (*Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48 [1st Dept 2016]; *Pekelnaya v Allyn*, 25 AD3d 111, 121[1st Dept 2005]).

Moreover, a review of the record reveals that Kwon did not create the subject hazardous condition, nor was she ever made aware of the specific cause of it, prior to plaintiff's exposure to it (*see Litwack v Plaza Realty Invs., Inc.*, 40 AD3d 250, 250-251 [1st Dept 2007] ["There being no other evidence tending to show that defendants created or had notice of the alleged mold hazard, the action was properly dismissed," where "defendants' knowledge of a brown discoloration spot and surrounding wetness on a wall in the apartment, and of the small leak in the steam pipe behind the wall, did not, as a matter of law, constitute notice of the potential for the mold growth that allegedly caused plaintiff's injuries"]).

As to Paramount, a review of the record reveals that Paramount's plumbing work on Unit's floor passed inspection by the DOB on November 26, 2008 and on March 9, 2009, and Massaro testified that the subject pipes would have had to have been connected in order to have passed inspection. Massaro also testified that Paramount performed its work to VJB's satisfaction, and that it was ultimately paid. However, Massaro has no personal knowledge with respect to the installation or inspection of the subject pipe, for which Paramount has unequivocally admitted they were exclusively responsible, and the court finds the bald assertions offered as to what was likely done or what was supposed to have been done at the time to be unavailing. Moreover, the proof submitted and the parties' statements at oral argument (tr at 65-66) tend to raise an issue of fact as to whether the final inspections performed by the DOB were made after the wall was put up and the subject pipe no longer visible to the inspectors.

The court has considered the parties' remaining contentions and finds them to be either without merit or moot. Further, although not raised by the parties, the court notes that plaintiff has failed to take further proceedings for a default against VJB for nearly two years. As such, the court will dismiss the complaint and any cross claims as against VJB upon its own initiative pursuant to CPLR 3215 (c).

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff West End Enterprises, LLC's (West End) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against it is granted, and the complaint and all cross claims and counterclaims are dismissed as against West End, with costs and disbursements to West End as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of West End; and it is further

ORDERED that defendant Min Kyung Kwon's (Kwon) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against her is granted, and the complaint and all cross claims are dismissed as against Kwon, with costs and disbursements to Kwon as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Kwon; and it is further

ORDERED that defendant/third-party defendant Paramount Plumbing Co.'s (Paramount) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint and all cross claims against it is denied; and it is further

ORDERED that defendants Adagio Condominium (Adagio), Algin Management Co., LLC (Algin) and Solstice Residential Group, LLC's (Solstice) (collectively, the Adagio defendants) cross motion, pursuant to CPLR 3212, for summary judgment in their favor is denied; and it is further

ORDERED that the complaint and any and all cross claims against defendant/third-party defendant VJB Construction Corp. are dismissed with prejudice; and it is further

ORDERED that the remainder of the action is severed and shall continue bearing the following caption:

----------X
GREGORY SMITH,

Plaintiff,

Index No.: 152533/2015

- against -

ADAGIO CONDOMINIUM, ALGIN MANAGEMENT CO., LLC, SOLSTICE RESIDENTIAL GROUP LLC, and PARAMOUNT PLUMBING CO. OF NEW YORK, INC.,

Defendants.
----------X

It is further

ORDERED that plaintiff shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on all parties and on the county clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M) who shall mark their records to reflect the change in the caption herein.

Dated: Dec 20, 2018

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.