IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHARLES BRANDT and NANCY BRANDT,	)	
Plaintiffs,	)	
	)	C.A. No. 97C-10-132-RFS
v.	)	
ROKEBY REALTY COMPANY, *et al.*,	)	
Defendant.	)	

Dated: August 3, 2007

O R D E R

On Defendant's Motion to Exclude Evidence of Tenant Complaints. Denied.

Jeffrey M. Weiner, Esquire, Wilmington, Delaware for the Plaintiffs.

David E. Wilks, Esquire and Katharine V. Jackson, Esquire, Reed Smith LLP, Wilmington, Delaware for the Defendant Rokeby Realty Company.

STOKES, J.

Defendant has moved to exclude evidence of tenant complaints regarding air quality and alleged injuries at the office building for three reasons:

First, the argument is made that the tenants did not share common air handling equipment or even draw air from the same supply as Plaintiff's office located in Suite 200. However, this is a disputed issue of fact for a jury to decide. There is evidence that all three floors are served by one outside air intake chase. Air could migrate between the floors. Whether the plenum space above Suite 201, a suite occupied by Feminist Therapy Associates ("FTA"), was effectively isolated is also a disputed question of fact. The existing air system (for a common air plenum) was reflected in a 1995 design and installation of extensions intended for that office. The detail about "added ductwork" suggests a connection to the second floor plenum. The FTA tenants would also be exposed to the air in the bathrooms and common areas. The jury - not the Court - must weigh the probative value of this evidence.

Second, the argument is made that no expert testimony links the tenant health problems to any of the problems of which Brandt seeks damages. This is an overstatement because the tenant health problems and the problems raised by Brandt both address poor air quality. Furthermore, the tenants and Brandt have at least some common symptoms.

Further, in response to continuing complaints about poor indoor air quality and to information provided by Indoor Air Solutions in February of 1996, Defendant employed an expert, W. Curtis White, to investigate, analyze and report his findings to Defendant about the environmental status of the building. Without considering other expert testimony, his report provides the connection which Defendant claims to be missing.

On June 6, 1996, White wrote:

> **Interpretation of Test Results:** There are no government approved or generally accepted standards for "safe" levels of microbial contamination, although the U.S. Air Force environmental laboratories at Brooks Air Force Base has recommended an "action level" of 200 CFU per cubic meter of air. Our interpretations and recommendations are based on what we believe to be the most reliable scientific data and on our many years of experience with the kind of testing performed and with typical human reactions at various levels of microbial contamination. Overall test results are much more meaningful than individual sample results. In any set of tests there may be aberrations which are not representative of the overall building condition. In general, for testing done with the Single Stage Andersen Air Sampler, sample levels below 70 CFU per cubic meter are extremely good. Those levels are acceptable for most individuals. *Levels from 70 to 140 are marginal for hypersensitive individuals and levels above 140 could be expected to cause some problems for a significant number of individuals. Levels above 350 are an indication of definite, widespread problems.* For surface samples, the intensity of growth is of importance in assessing overall contamination potential, but the identification of organism types is of much greater value for assessment of potential human risk.

> Although total numbers are a good indicator of building condition, it is also important to look at the species present and the distribution of species. *The potential for triggering serious human reaction varies dramatically from species to species. Fungi such as Stachybotrys atra, Aspergillus oryzae, and Aspergillus versicolor are considered to be so dangerous that any presence is considered significant.* In contrast, common fungi such as Hormoconis sp. (formerly known as Cladosporium sp.) have a low potential for causing human health problems, even at relatively high concentrations. Fungi such as Penicillium chrysogenum are known to trigger allergic reactions for a high percentage of individuals. A normal environment will have several species of organisms with none dominating. Where one or more species have gained dominance, an imbalance has been created and the imbalance would suggest that remedial action be taken at lower total levels. *Finally, adding to the complexity of the above, is the fact that hypersensitive individuals can have severe reactions at extremely low levels or to organisms which have little or no effect on normal individuals.*

Ex. J of Notice of Brandt Pls.' Resp. In Opp'n - Evidence of Tenant Compls. At 2-3.

White's report is an admission under D.R.E. 801(d)(2)(c). *See ONTI, Inc. v. Integra Bank*, 1998 WL 671263 (Del. Ch. Aug. 25, 1998); *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). While these cases involve expert depositions, there is no principled reason to treat White's report differently. It is an expert's routine report to determine the state of the building. White's report provides evidence of safe standards and effects on people which is relevant under D.R.E. 402. *See Kupendua v. Emsley*, 1997 WL 528259 (Del. Super. July 24, 1997) (reviewing statutes, regulations and excerpted deposition testimony, the court concluded that a "defective

condition" exists only when painted surfaces are found to contain 0.7 milligrams per square centimeter or more of lead).

As the Court ruled last summer:

> Furthermore, Brandt points out that in comparison to standards laid out by Defendant's expert W. Curtis White, fourteen of the sixteen tests taken at Three Mill Road produced results marginal for hypersensitive individuals, and eleven produced results commensurate with causing problems for a significant number of individuals. In addition, he notes that some of the other tenants complained of poor air quality. One tenant, Borin, had test results that showed abnormal results in relation to mold counts, and, according to Brandt, Barbara McCloskey, also had developed a sensitivity to mold.

Brandt v. Rokeby Realty Co., 2006 WL 1942314, at *25 (Del. Super. July 7, 2006).

The testing showed levels of contamination in excess of the safety standards recognized by White.

Third, Defendant argues that the probative value of the evidence is substantially outweighed by the dangers of unfair prejudice and confusion under D.R.E. 403. Tenant complaints are relevant to show the pervasive nature of the mold problems at the building. This is a properly recognized factor. *See New Haverford P'ship v. Stroot*, 772 A.2d 792, 800 (Del. 2001). Evidence of the complaints is also relevant to show foreseeability of potentially adverse health problems for significant numbers of people which a reasonable landlord under similar circumstances may be expected to investigate and remedy. *See Jardel Co. v. Hughes*, 523 A.2d 518, 526

(Del. 1987) (finding on the issue of foreseeability of harm, that prior crime statistics were part of the "circumstantial setting" to measure the degree of security expected of a reasonable mall owner). The Defendant has questioned whether the alleged injury to Plaintiff is so idiosyncratic that a reasonable landlord should not anticipate it. The foregoing evidence addresses that contention as well. *See Brandt* 2006 WL 1942314.

Moreover, tenant complaints are probative of the Defendant's state of mind on the punitive damages question. *See Littleton v. Young,* 1992 Del. LEXIS 15 (Del. Jan. 2, 1992). "[T]he focus [for punitive damages] is upon the defendant's state of mind."); *Brandt,* 2006 WL 1942314. Tenant complaints about the need for repairs and the landlord's alleged indifference to them are part of the circumstantial setting of this case.

Upon consideration, I find that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice or confusion.

Accordingly, Defendant's motion is denied.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

oc: Prothonotary
cc: Jeffrey M. Weiner, Esquire
David E. Wilks, Esquire