

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
March 9, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SIMONETTI SAMUELS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
v.)	
)	Nos. 06 L 9247, 06 L 9248,
TISHMAN SPEYER PROPERTIES, INC.; TISHMAN)	& 06 L 9249 (consolidated)
SPEYER HOLDINGS, INC.; and TST 525 MONROE,)	
L.L.C.,)	The Honorable
)	Kathy M. Flanagan,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court did not abuse its discretion in denying plaintiff an opportunity to amend her complaint to add a spoliation of the evidence count over five years after she knew or should have known the evidence had been destroyed.

1-10-2120

¶ 2 Plaintiff, Simonetti Samuels, appeals the trial court order denying leave to amend her complaint to add a claim for spoliation of evidence against defendants, Tishman Speyer Properties, Inc., Tishman Speyer Holdings, Inc., and TST 525 Monroe, L.L.C. (Tishman defendants). Plaintiff contends the trial court erred in refusing to allow the amendment. Based on the following, we affirm.

¶ 3 **FACTS**

¶ 4 On November 30, 1999, plaintiff filed a negligence complaint seeking damages for injuries she allegedly sustained from exposure to toxic substances while working as an attorney at the law firm Katten Muchin & Zavis (KMZ) located at 525 W. Monroe in Chicago, Illinois. The Tishman defendants owned the building. Plaintiff's office was on the 15th floor.

¶ 5 Plaintiff worked at KMZ from 1995 through December 1997. During that time, plaintiff experienced a number of serious ailments, including respiratory issues. She was ultimately declared disabled after having missed blocks of time from work in 1997. Upon leaving KMZ, plaintiff took approximately 60 to 70 boxes of materials that had been in her office. Plaintiff placed those boxes in a storage unit.

¶ 6 From 1998 to 1999, plaintiff asked KMZ for access to the office in order to conduct air quality testing. Plaintiff's consultant, Doctor Luke Curtis, an environmental expert, submitted a proposal for the air testing in January 1999, which included methods for determining whether any allergens were present. In August 1999, KMZ granted plaintiff permission to test the floor where her office was located; however, KMZ offered only limited access and informed plaintiff that any testing would be at her expense. Plaintiff never took KMZ up on its offer and also never

1-10-2120

performed any testing on her boxes that were in storage.

¶ 7 In June 2001, KMZ discovered that mold existed in the wall stretching between the 14th and 16th floors of the 525 W. Monroe building. In particular, there was visible mold and water damage on a wall on the 15th floor that housed a kitchen area and was near plaintiff's former office. KMZ subsequently hired a company to remediate the mold from the drywall and other moldy materials. A large section of the effected wall was cut out. KMZ hired Keter Consultants to test the mold and the Tishman defendants hired Carnow, Conibear & Associates to perform additional testing. According to plaintiff's deposition testimony¹, she received a copy of the resulting report, which revealed high levels of mold, including stachybotrys, memnoniella, aspergillus, and penicillum, had been found at KMZ. Sometime after the testing was completed, the moldy drywall was placed into the building's trash container and apparently was thrown out by a Tishman employee.

¶ 8 On December 24, 2001, plaintiff filed an amended complaint.

¶ 9 On July 24, 2008, plaintiff filed a motion for leave to amend her complaint to add a count for spoliation of evidence against defendants. In that motion, plaintiff alleged that if she had been allowed to test the mold in June 2001 her consultant would have been able to discover the specific type of mold, the extent and depth of mold, whether the mold could or was likely to have existed during her employment, and whether the mold produced mycotoxins sufficient to cause her injuries. An expert disclosed by plaintiff opined that an independent examination in 2001 would have produced different results than the findings presented by the Tishman defendants'

¹Plaintiff's deposition was taken on December 9, 2002.

1-10-2120

testing. In the motion, plaintiff claimed the Tishman defendants were aware of plaintiff's pending complaint filed in 1999 when they tore down and were involved in the disposition of the moldy drywall in 2001, and that they failed to give plaintiff prior notice of the remediation. Plaintiff further alleged that, as a result of defendants' actions, plaintiff had "substantially less" evidence of her mold exposure and it having caused her injuries. The trial court denied plaintiff's motion.

¶ 10 Plaintiff's negligence case proceeded to trial in June 2010. Prior to trial, plaintiff was granted a motion in limine for an adverse inference against the Tishman defendants as a result of their destruction of the moldy drywall without giving prior notice to plaintiff. Plaintiff was also granted her request that the jury be given Illinois Pattern Jury Instructions, Civil, No. 5.01 (2008) (hereinafter, IPI Civil (2008) No. 5.01).

¶ 11 At trial, numerous witnesses testified regarding the extensive water damage in the building. In particular, Dr. Curtis testified that the building records demonstrated that there had been seven "major" water leaks from 1992 to 1997. Various witnesses acknowledged that the Tishman defendants should have performed mold testing prior to 2001. Plaintiff presented expert testimony providing that she was exposed to injury causing mold while she was employed at KMZ. According to Dr. Curtis' testimony, the mold found in 2001 likely was present during plaintiff's employment. Dr. Curtis, however, admitted that the tests available in 2001 would not have been able to date the mold more than a few days or weeks. Plaintiff's other expert, Doctor Eckardt Johanning, a family doctor with a specialty in environmental medicine, testified that the antibodies found in plaintiff corresponded with the mold found in KMZ in June 2001. Plaintiff's

1-10-2120

treating doctor testified that plaintiff suffered from chronic fatigue immunodeficiency syndrome. Defendants' medical experts disagreed with plaintiff's diagnosis, finding no evidence of mold allergies or a basis that the injuries stemmed from the mold issue at the KMZ office.

¶ 12 Pursuant to IPI, Civil (2008) No. 5.01, plaintiff argued to the jury that had any testing been performed on the mold found in 2001 the results would have been adverse to the Tishman defendants.

¶ 13 The jury ultimately found in favor of the Tishman defendants.

¶ 14 **DECISION**

¶ 15 As an initial matter, we note that defendants filed a motion to dismiss this appeal on the bases of *res judicata* and collateral estoppel. The motion, which was taken with the case, is denied, as we consider the substance of the appeal.

¶ 16 The sole question presented on appeal is whether plaintiff should have been granted leave to add a spoliation count to her negligence complaint.

¶ 17 The parties challenge the appropriate standard of review. Plaintiff contends that because she was not seeking to cure an existing count in her pleading the applicable standard of review is *de novo*. Defendants, on the other hand, contend the applicable standard of review is abuse of discretion. We agree with defendants.

¶ 18 In *Jones v. O'Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 871 N.E.2d 98 (2007), the Fifth District of this court applied the standard factors for determining whether an amendment was warranted when the plaintiff similarly requested leave to amend his complaint to add a spoliation of the evidence count. The Jones court succinctly provided the applicable law:

1-10-2120

“Section 2-616 of the Code of Civil Procedure permits parties to amend their pleadings at any time before a final judgment is rendered ‘on just and reasonable terms.’ 735 ILCS 5/2-616(a) (West 2000). This statute is to be interpreted liberally so that cases may be decided on their merits rather than on the basis of flaws in the pleadings. The decision to permit or deny leave to amend pleadings is within the discretion of the trial court, and we will not reverse its decision absent an abuse of that discretion. [Citation.] Courts are to consider the following factors when deciding whether to grant leave to amend pleadings: (1) whether the proposed amendment would cure a defect in the pleadings, (2) whether other parties would sustain prejudice if the amendment is allowed, (3) whether the amendment is timely, and (4) whether the party had previous opportunities to amend the pleadings.” *Jones*, 374 Ill. App. 3d at 936-37 (citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273, 586 N.E.2d 1211 (1992)).

¶ 19 After determining that the first factor was not applicable because the proposed amendment was a new cause of action not aimed at curing any pleading defects, the *Jones* court continued to apply the *Loyola* factors and ultimately concluded that amending the underlying complaint just one month prior to trial when the plaintiff had knowledge of the information supporting the claim for at least two months prior thereto was untimely and prejudicial. *Jones*, 374 Ill. App. 3d at 937.

1-10-2120

¶ 20 Similarly, in this case, the first factor is not applicable where plaintiff attempted to amend her complaint by adding an entirely new cause of action for spoliation of the evidence.

¶ 21 As to the second factor, the amendment was requested nearly two years prior to the start of trial. Moreover, the evidence supporting the new cause of action essentially was collected as discovery in the underlying case. We, therefore, find defendants would not have suffered undue prejudice if the amendment had been allowed.

¶ 22 As to the third and fourth factors regarding timeliness and an opportunity to amend, plaintiff filed her motion in July 2008. While the parties do not represent, and our review of the record does not reveal, exactly when plaintiff became aware that the moldy drywall had been destroyed, it is clear from plaintiff's December 9, 2002, deposition testimony that she obtained a copy of the report revealing the test results from the drywall. Therefore, plaintiff knew by December 9, 2002, at the latest, that the moldy drywall had been removed. Plaintiff, however, presents no evidence that she attempted to test the moldy drywall once she learned it had been removed. Whether and exactly when she discovered that the drywall had been destroyed is immaterial where her motion claimed, and Dr. Curtis' trial testimony supported, that Dr. Curtis should have been afforded the opportunity to have been present for the remediation and then subsequently to have performed his own battery of tests on the drywall. Accordingly, the crucial time for conducting the independent testing was near the time the drywall was removed as evidenced by Dr. Curtis' trial testimony that testing methods at the time could only predict the growth of mold by days or weeks. Plaintiff, however, waited at least 67 months after learning of the positive mold report to file her motion requesting to amend her complaint to add the

1-10-2120

spoliation count.

¶ 23 Plaintiff disingenuously argues that her motion to amend was improperly denied without the benefit of the motion process to reveal when plaintiff knew "that everything had been destroyed and that nothing had been preserved." Noticeably absent from her reply brief is an argument indicating that she learned of the drywall's destruction within a timely period of filing her motion. We find it reasonable to conclude plaintiff knew the drywall had been disposed of at or near the time she learned that it had been tested by KMZ and defendants, which was, at the latest, December 9, 2002. Assuming the statute of limitations was five years as suggested by plaintiff, the limitations period started when she knew or "should have known" the drywall was destroyed. *Schusse v. Pace Suburban Bus Division of the Regional Transportation Authority*, 334 Ill. App. 3d 960, 970, 779 N.E.2d 259 (2002). We, therefore, conclude plaintiff's requested amendment was not timely and that she had ample opportunity to amend.

¶ 24 In sum, the trial court did not abuse its discretion in denying plaintiff's request for leave to amend her complaint to add a spoliation count.

¶ 25 **CONCLUSION**

¶ 26 We affirm the judgment of the trial court denying plaintiff's request to add a spoliation count to her amended complaint.

¶ 27 Affirmed.