

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss.

SUPERIOR COURT
NACV2004-00058

ANDREW SACKETT & another¹

vs.

ONEBEACON INSURANCE & others²

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT BENABBY, INC. D/B/A DISASTER SPECIALISTS'
MOTION FOR SUMMARY JUDGMENT UNDER MASS. R. CIV. P. 56**

The plaintiffs, Andrew and Terri Sackett, filed this action alleging breach of contract, negligence, fraud, and unfair insurance practices arising from the defendants' failure to properly investigate and remediate damage to the Sackett residence caused by a flood. This matter is before the court on Defendant Benabby, Inc. d/b/a Disaster Specialists' Motion for Summary Judgment Under Mass. R. Civ. P. 56. For the reasons discussed below, the defendant's motion is **ALLOWED**.

BACKGROUND

Viewed in the light most favorable to the Sacketts as the non-moving parties, the undisputed facts as revealed by the summary judgment record are as follows.³ The Sacketts own a residence at 10 Warren Street in Nantucket ("the Property"). Defendant OneBeacon Insurance ("OneBeacon")

¹Terri Sackett

²Cedarcrest, Inc.; Charles Harootunian; Friedline & Carter Adjustment, Inc.; and Benabby, Inc. d/b/a Disaster Specialists

³This Court, in its discretion, **DENIES** Benabby's Motion to Strike Plaintiffs' Response to Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment.

issued homeowners insurance policies to the Sacketts which covered the Property. On January 25, 2003, the Property sustained water damage when pipes froze and burst. Several feet of water flooded the boiler inside a crawlspace and damaged the kitchen, dining room, and main bedroom.

On February 5, 2003, Terri Sackett reported the water damage loss to Congdon & Coleman Insurance Agency ("C&C"), the authorized insurance agent of OneBeacon. C&C assigned defendant Friedline & Carter Adjustment, Inc. ("Friedline"), an independent adjusting company, to adjust the Sacketts' claim on behalf of OneBeacon. Friedline assigned insurance adjuster Normand Lague ("Lague") to handle the Sacketts' water claim. On February 6, Lague inspected the Property. Thereafter, he inspected the Property on several occasions and never noticed any unusual smells. Lague advised the Sacketts to have the pipes fixed and to restore heat to the Property.

Terri Sackett arrived on the island on February 20, 2003 and went to the Property. She observed that the radiators had cracked and there was water splattered on the wall. There was a towel in the basement crawlspace and watermarks on the wall. There was no standing water or ice on the floors and the area rugs in the master bedroom, guest bedroom, and living room did not appear to be wet. However, the cabinet under the kitchen sink was buckled, and there was some slight cupping of the floorboards. On March 11, 2003, the heat was partially restored to the Property. In late March or early April of 2003, the Sacketts removed wet batts of insulation and other wet and visibly moldy materials from the crawlspace in their basement. Once they did this, there was no evidence that the crawlspace was wet. The only mold observed by Terri Sackett in the crawlspace was on the materials they removed.

In mid-April, the Sacketts became concerned about the presence of mold at the Property after they noticed a bad odor from the kitchen sink cabinet area. They informed C&C of this

development. C&C gave the Sacketts the business card of Jim Church ("Church") of defendant Benabby, Inc. d/b/a Disaster Specialists. Church is a certified mold remediation technician, having completed a three-day mold remediation class. According to Church, a mold remediation technician is not trained to identify visible mold or perform mold or air quality testing. A mold remediation technician can read and understand mold testing reports but is not qualified to develop a remediation protocol based on those results. On April 23, Andy Sackett called Lague and asked whether they could use Disaster Specialists to remediate the Property and Lague answered affirmatively. Andy Sackett then called Disaster Specialists and explained what had happened at the Property. Church stated that they used to have an in-house industrial hygienist who went into business on her own, but that Disaster Specialist used Douglas Williams ("Williams") of American Home & Environmental to perform mold testing.

On April 30, 2003, the Sacketts retained Williams, a home builder and inspector who has taken a one day class on mold sampling. Williams inspected the Property that day and found everything to be pretty dry. The cellar had a slight musty smell which is typical of a basement with dirt floors. Williams performed mold testing inside the house, outside the house, and in the crawlspace. While testing the kitchen, Williams told Terri Sackett that his nostrils were burning and his throat was dry. Williams observed mold in the vanity in the master bathroom.

On May 8, 2003, Williams received the test results. He sent an e-mail to Terri Sackett stating that he had observed little evidence of the water leaks other than some warping of the floor boards, but the testing was positive for mold and the Property required cleaning by a professional mold company. Andy Sackett forwarded these test results to Church, C&C, and Lague. Lague told the Sacketts there was no reason to perform further testing and they should work with Disaster

Specialists to remediate the Property. Church visited the Property on May 28, and asked Terri Sackett to sign a work authorization form so he could get paid, which she did. She explained to him about the water loss and burst pipes, and the strong odors she smelled under the kitchen cabinets and in the dining room. Church surveyed the Property, walking from room to room with Terri Sackett. She showed him the mold in the main bathroom discovered by Williams. Church said he would generate an estimate for scrubbing the entire house and review it with Lague. Church intended to send the invoices for his work directly to Lague to be paid by OneBeacon. Following her meeting with Church, Terri Sackett called Williams and informed him that Disaster Specialists would conduct whole house scrubbing. On June 1, 2003, Church sent the Sacketts an estimate to clean the Property by HEPA vacuuming, disinfecting and washing all the walls, ceilings, floors, light fixtures and cabinets, cleaning the windows, and cleaning the room contents.

On June 2, 2003, Curtis Silva ("Silva") and Rob Coughlin ("Coughlin") from Disaster Specialists arrived at the Property. Silva, who was the foreman, was certified as a mold remediation technician. Terri Sackett informed them that even though the master bathroom was under construction, they could access it. She also told them that she was taking the dogs to be boarded and had secured the cottage across the street. They told her she could stay at the Property during the whole house scrubbing. However, when Sackett called Williams, he recommended against staying at the Property.

Disaster Specialists performed work at the Property for five days. Silva and Coughlin HEPA vacuumed the walls and ceilings, scrubbed the walls, cabinets and furniture, cleaned interior contents, painted the bottom of the kitchen sink cabinet with polyurethane, and set up dehumidifiers and negative air machines to clean the air. They also removed insulation in the basement, HEPA

vacuumed the ceiling frame, and disinfected and washed the ceiling frame. They did not perform any containment, as Church had not included that in the scope of work. In addition, they told Terri Sackett that they were not authorized to go into the closets and cabinets. Toward the end of the week, a neighbor who had experienced a water loss asked Terri Sackett whether Disaster Specialists was working from a mold remediation plan or protocol. According to Church, test results and a remediation protocol are necessary only if there is more than ten square feet of visible mold. At the end of the week, Disaster Specialists told the Sacketts it was safe to move back to the Property, which they did.

On June 10, 2003, Terri Sackett had a meeting at the Property with Lague, Church, and Williams. She asked whether there was a remediation plan for the Property, and Williams replied that he did not write a plan because he was not funded to do so. During the meeting, Williams discovered that the Sacketts had not given Lague or Disaster Specialists his entire report, so Disaster Specialists had cleaned the Property without any information about the basement. Terri Sackett showed Church and Williams that there was still visible mold in the main bathroom and took them into the kitchen to smell under the sink. Church denied prohibiting his workers from accessing closets or cabinets, and stated that Disaster Specialists could come back and perform additional work at the Property. Terri Sackett demanded to know how the work could have proceeded without a written remediation plan, and Williams stated that he could create one.

Williams put together a remediation protocol the next day and sent it to Church, who faxed it to C&C. The protocol required very specific cleaning methods as well as the removal, drying and sealing of the floors. Church called Terri Sackett and offered to return to the Property to do additional work in accordance with the protocol, but she responded that they had hired Thomas

Hamilton ("Hamilton") instead. She told Church she did not want Disaster Specialists to do any further work on the Property, and asked him to come pick up his equipment. Disaster Specialists had left negative air machines at the Property, which were running all weekend until Terri Sackett unplugged them. Church sent someone to pick up this equipment a week later. Although Disaster Specialists had performed between \$3,000 and \$4,000 of work on the Property, Church decided not to submit a bill to Lague or OneBeacon because Terri Sackett was belligerent at the meeting and he did not want any further involvement.

Hamilton holds a BS in Metallurgical Engineering, has been a certified industrial hygienist since 1980, and is a member of the American Industrial Hygiene Association. He conducted air testing at the Property on June 15, 2003 and observed no wetness or mold growth. He observed water damage only on one piece of wood located under the kitchen sink near the main pipe break. However, he observed that in the kitchen, the kickplates on the bottom of the cabinets had not been removed to ensure drying and provide access for cleaning. He observed mold growth on the floor joists in the crawlspace, but it was not extensive, although he was not able to fully access the crawlspace due to its physical size. Hamilton observed less than 100 square feet of visible mold, a level which normally does not require remediation. He conducted moisture readings which showed that the walls and cabinets were dry but the kitchen and dining room floors were very moist, above the level which causes wood to decay and mold to grow. He took air samples for mold in the kitchen, dining room, and crawlspace.

Hamilton produced an Indoor Mold Assessment which reported significantly elevated concentration of mold spores in the air in the kitchen, dining room, and living room. He identified the likely source as mold inside the kitchen cabinetry and possibly the kitchen and dining room floor.

Hamilton reported that the airborne mold spore concentrations in the crawlspace were normal and caused by outside air. Hamilton submitted a mold remediation protocol for the Property on June 24, 2003, which recommended removal of the kitchen and dining room floors and the kitchen cabinets. He recommended that the Sacketts not remain in the Property.

Meanwhile, on June 17, 2003, OneBeacon retained defendant Charles Harootunian ("Harootunian") of I.A.Q. Inspectional Services to take mold samples at the Property. Harootunian, who is certified by the Indoor Air Quality Association to perform mold remediation, submitted a report and remediation protocol to OneBeacon on July 2, 2003. Harootunian disagreed with Hamilton's recommendation that the hardwood floors be ripped up and refused to add that work to his protocol plan.

Hamilton believes that if his recommendations had been followed immediately, there is a good chance that the mold problem would have been eliminated. However, the floors were not immediately removed, additional remediation became necessary, and Hamilton produced a second protocol in May of 2004. In 2005, the Sacketts proceeded with reconstruction of the Property. Hamilton produced a third remediation protocol in June of 2006.

On December 24, 2003, Hamilton sent the Sacketts an e-mail opining that Disaster Specialists' work at the Property caused the mold problem and but for their work, the Sacketts should have been able to remediate their home prior to December of 2003. At the time he formed this opinion, Hamilton did not know whether Disaster Specialists had observed any mold at the Property, and he had not reviewed any correspondence, proposals, reports, or remediation recommendations prepared by Disaster Specialists.

Count VIII of the Sacketts' Second Amended Complaint alleges that Disaster Specialists was

negligent with respect to the remediation of the Property. The Sacketts believe that regardless of the level of mold that may have been present in the Property prior to the flood, Disaster Specialists should have reduced the mold to an acceptable level. During her deposition, Terri Sackett opined that Disaster Specialists should have been aggressive in ripping out the kitchen cabinets and hardwood floors, and should have conducted proper containment and negative air handling. She believes that Disaster Specialists' conduct exacerbated the extent of damage at the Property, but she cannot say by how much. She believes that because they left the air scrubbers running all weekend without changing the filter, mold spread throughout the house. She asserts that before Disaster Specialists started working at the Property, there were low levels of mold spores, but after they left there were extremely high levels of mold spores. Therefore, she has concluded that "whatever they were doing caused the mold to go out of control."

According to Hamilton, remediation is a trial and error process and there is no guarantee that the first remediation plan for a project will work. Hamilton opines that mold was already growing at the Property before Disaster Specialists arrived. In Hamilton's opinion, Disaster Specialists performed the cleaning of the Property requested by Williams properly and acceptably. Hamilton concedes that it was proper for Disaster Specialists to act on Williams's recommendation of whole house scrubbing, and it was not Disaster Specialists' fault that there was not a more detailed remediation protocol. Hamilton concedes that it is the responsibility of an industrial hygienist, not a mold remediator, to create such a protocol. However, he opines that Disaster Specialists should have recognized the extent of the moisture and mold problems at the Property and the need for remediation beyond just cleaning. Hamilton opines that when potential mold is detected, a remediation company should bring in an industrial hygienist to create a remediation protocol, and

should do no further work without such a protocol. He believes that Disaster Specialists was negligent in proceeding with cleaning without a protocol prepared by an industrial hygienist because that was "a waste of time" which did not bring the Property closer to remediation.

The Sacketts have retained industrial hygienist and mold expert Robert Jones ("Jones") to testify at trial. However, Jones's expert report does not mention Disaster Specialists. They have also retained mold experts Eric Anderson and Barry Westbrook ("Westbrook"), neither of whom has offered any opinion about the conduct of Disaster Specialists. Westbrook, who has never visited the Property, has provided an expert opinion on the improper installation of a Humivent machine as part of the remediation process. However, it is undisputed that Disaster Specialists is not the party who recommended or employed that equipment.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, b809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716

(1991).

Disaster Specialists contends that it is entitled to judgment as a matter of law on Count VIII of the Second Amended Complaint because the Sacketts have no reasonable expectation of proving that Disaster Specialists breached any duty of care owed to them. Before liability for negligence can be imposed, there must be a legal duty owed by the defendant to the plaintiff, and a breach of that duty proximately resulting in injury. Remy v. MacDonald, 440 Mass. 675, 676 (2004); Davis v. Westwood Group, 420 Mass. 739, 742-743 (1995). Under Massachusetts law, third parties who are foreseeably injured by a contractor's negligent performance of a contractual duty have a tort claim against the contractor. Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113-114 (1990); Banaghan v. Dewey, 340 Mass. 73, 80 (1959); LeBlanc v. Logan Hilton Joint Venture, 78 Mass. App. Ct. 699, 707 (2011).⁴ When a party binds himself by contract to perform a service, he agrees by implication to use reasonable and appropriate care and skill in doing it. Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 395-396 (2003); Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 143 (1937). His duty arises out of the contract and is measured by its terms. Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. at 396; Parent v. Stone & Webster Eng'g Corp., 408 Mass. at 113; Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. at 144; Bulpett v. Dodge Assoc., Inc., 5 Mass. App. Ct. 593, 598 (1977). See, e.g., Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 430 (1995) (title insurer not liable for alleged negligence in failing to disclose title defects, where policy did not impose duty to search title records and identify defects).

⁴For purposes of this motion, this Court will assume that OneBeacon, not the Sacketts, contracted with Disaster Specialists. In any event, whether the Sacketts entered into a contract with Disaster Specialists or were third parties to the contract is irrelevant for purposes of analyzing their tort claim.

Cf. Parent v. Stone & Webster Eng'g Corp., 408 Mass. at 115 (installer of electrical distribution panel could be liable in negligence to electrocuted employee where its contract with employer gave it ongoing responsibility for safety).

Here, the undisputed evidence reveals that Disaster Specialists contracted to provide mold remediation in the recommended form of whole house scrubbing of the Property. There is no evidence in the summary judgment record that Disaster Specialist failed to use reasonable care in performing this undertaking. Indeed, the Sacketts' expert, Hamilton, concedes that Disaster Specialists properly and acceptably performed the cleaning of the Property requested by Williams. Hamilton's opinion that Disaster Specialists should have recognized the extent of the mold problem, identified the need for a remediation protocol, and refused to clean the Property without one cannot form the basis of a negligence claim where the record is devoid of evidence that Disaster Specialist's contractual arrangement encompassed a duty to evaluate the extent of the mold and ensure preparation of a proper remediation protocol.⁵ The record shows only that Disaster Specialists was hired to carry out the instructions of Williams, who performed mold testing, that the Property required "cleaning by a professional mold company."

Nor is there evidence in the summary judgment record that Disaster Specialists voluntarily assumed any duty outside the scope of the contract that would require it to identify the need for preparation of a proper remediation protocol. Cf. Somerset Sav. Bank. v. Chicago Title Ins. Co., 420

⁵The plaintiffs' citation to standards promulgated by the Institute of Inspection, Cleaning and Restoration Certification for the proposition that in some cases, a mold remediator should call in an industrial hygienist is inadmissible because it is undisputed that the IICRC standards did not exist at the time Disaster Specialists performed its work at the Property. See Dominick v. Brockton-Taunton Gas Co., 356 Mass. 669, 671-672 (1970) (industry safety regulations promulgated after accident irrelevant to whether defendant breached duty of care).

Mass. at 431 (title insurer could be liable in negligence for failure to search records if it voluntarily assumed duty to do so). Because no rational view of the evidence warrants a finding that Disaster Specialists was negligent in performing its contractual undertaking, summary judgment is appropriate. See LeBlanc v. Logan Hilton Joint Venture, 78 Mass. App. Ct. at 708.⁶

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Benabby, Inc. D/B/A Disaster Specialists' Motion for Summary Judgment Under Mass. R. Civ. P. 56 be **ALLOWED**.


Richard J. Chin
Justice of the Superior Court

DATED: September 15, 2011

⁶It should be noted that Terri Sackett's lay opinion that Disaster Specialists was negligent in failing to conduct proper containment and negative air handling, and that leaving the air scrubbers running all weekend caused mold levels to explode, is not admissible to establish either the duty of care owed by a mold remediator or causation. See Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. at 403 (expert testimony required to establish standard of care professional owes to client unless negligence is so gross or obvious that jurors can rely on common knowledge to recognize it); Providence & Worcester R.R. v. Chevron U.S.A., Inc., 416 Mass. 319, 323 (1993) (expert testimony required to establish causation in oil contamination case); Atlas Tack Corp. v. Donabed, 47 Mass. App. Ct. 221, 227 (1999) (expert testimony necessary to establish negligence with respect to environmental cleanup).