

# FOUR STEPS TO AVOID TOXIC MOLD LITIGATION

PHYLLIS H. WEISBERG, ESQ.  
MONTGOMERY MCCRACKEN WALKER & RHOADS LLP

November 2013

• Currently, there are no United States Federal, New York State or New York City regulations for the assessment or remediation of mold growth. Two documents which are generally regarded as the most authoritative guidelines on mold prevention and remediation are:

1. New York City Department of Health “Guidelines on Assessment and Remediation of Fungi in Indoor Environments” (<http://nyc.gov/html/doh/downloads/pdf/epi/epi-mold-guidelines.pdf>)
2. EPA Guidance “Mold Remediation in Schools and Commercial Buildings” ([http://www.epa.gov/mold/mold\\_remediation.html](http://www.epa.gov/mold/mold_remediation.html))

## • Applicable Legal Principles

• Landlord’s Duty of Repair – Landlords of buildings with three or more apartments must keep the apartments and the building’s public areas in “good repair” and clean and free of vermin, garbage or other offensive materials. Landlords must maintain electrical, plumbing, sanitary, heating, ventilating systems and appliances which the landlord has installed (such as refrigerators and

stoves) in good and safe working order. N.Y. Multiple Dwelling Law §§ 78, 80.

- A landlord has a non-delegable duty to maintain the apartment in a reasonably safe condition. Daitch v. Naman, 807 N.Y.S.2d 95 (2006). A landlord cannot avoid this responsibility, even where a tenant has undertaken to remediate a mold condition.

• Warranty of Habitability – Tenants are entitled to a livable, safe and sanitary apartment. The warranty of habitability applies to cooperative apartments but not to condominiums. N.Y. Real Property Law § 235-b.

- Courts have found that triable issues of fact exist whether the warranty of habitability was breached as a result of mold in an apartment. Wiesel v. 310 East 46 LLC, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 03849 (1st Dep’t 2009); Graham v. Marshal, \_\_ N.Y.S.2d \_\_, 2007 N.Y. Slip Op. 32228 (Sup. Ct. N.Y. Cty. 2007). See, also Loss v. 407-413 Owners Corp., \_\_ N.Y.S.2d \_\_, No. 105897/07 (Sup. Ct. N.Y. Cty. 2009) (“question of fact as to whether the [mold] conditions in the unit were so severe that a reasonable person would find that the warranty of habitability

---

*Phyllis H. Weisberg is a partner in the Business Department of Montgomery McCracken. She has a general real estate practice with a focus on cooperative and condominium matters. Before joining Montgomery McCracken, Ms. Weisberg was a partner with Kurzman Karelsen & Frank, LLP( KK&F). Montgomery McCracken is a multidisciplinary law firm with more than 120 attorneys in offices in Pennsylvania, New York, New Jersey and Delaware providing full service to clients in a wide range of industries throughout the United States and internationally. Ms. Weisberg is the Chair of the Committee on Cooperatives and Condominiums of the New York City Bar Association. Ms. Weisberg was listed in the Martindale-Hubbell Bar Register of Preeminent Women Lawyers, First Edition, 2011; and again in 2012. She has also been listed in New York Super Lawyers for 2006, 2007, 2009, 2010, 2011, 2012, and 2013; and Super Lawyers, Business Edition 2011, 2012, and 2013. Ms. Weisberg was included in Avenue’s Legal Elite, compiled by Avenue and Lexis Nexis Martindale-Hubbell, as one of New York City’s top women real estate attorneys in Avenue Magazine and in New York Magazine’s March 2012 and March 2013 list of New York’s Women Leaders in the Law.*

*continued next page* ➔

had been breached.”). Unclear what the import of Fraser (see below) will be with respect to mold-related habitability claims.

- Notice of a “dangerous condition” - As a general rule, a landlord is liable for its failure to remediate a mold condition in an apartment where (1) it had actual or constructive notice of the mold condition (or created the condition) and (2) had a reasonable opportunity to remediate the mold and neglected or failed to do so. Litwack v. Plaza Realty Investors, Inc., \_\_\_ N.Y.2d \_\_\_, 2008 WL 4700971 (2008).

- Knowledge of a leak does not, as a matter of law, constitute notice of the potential for mold growth. Lark v. Leon B. Dematteis Associates, LLC, 48 A.D.3d 354, 851 N.Y.S.2d 529 (1st Dep’t 2008); Litwack, supra. See, also Daitch v. Naman, 807 N.Y.S.2d 95 (2006) (notice of discoloration of walls and knowledge of previous water damage from a flood, does not constitute notice of the likelihood of mold growth); Beck v. J.J.A. Holding Corp., 12 A.D.3d 238, 785 N.Y.S.2d 424 (1st Dep’t 2004) (There is no “ongoing duty to monitor [an] apartment for the possible development of environmental hazards.”).

- Fraser v. 301-52 Townhouse Corp., 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep’t 2008) (Court dismissed all mold-related personal injury claims on the grounds that there is no generally accepted scientific evidence of a causal relation between indoor dampness/mold and physical injury). An appeal is pending before the Court of Appeals.

- Not mold related, but important to be aware of:

“Tenant Notification of Indoor Air Contamination” N.Y. Environmental Conserva-

tion Law § 27-2405.

- Landlords who receive test results from an “issuer” showing contamination above applicable indoor air quality thresholds (i.e. DOH indoor air guidelines or OSHA guidelines for indoor air quality) must notify the tenant(s) and occupant(s) within 15 days following receipt of such test results.

- “Issuer” is defined as:

- (i) The New York State Department of Environmental Conservation, (NYS-DEC”);
- (ii) A municipality that has entered into a contract with NYSDEC to undertake an environmental restoration project;
- (iii) A person subject to an order issued pursuant to New York’s hazardous waste and oil spill clean-up laws; or
- (iv) A “participant” in New York’s Brownfield Cleanup Program (“BCP”).

- The notice must include (i) a “fact sheet” identifying the compound of concern, the applicable reportable detection levels, the health risks associated with exposure to the compound and where to obtain information and (ii) “timely notice of any public meetings required to be held to discuss such results.” Landlords must also send the actual test results and any applicable closure letter to the tenant/occupant upon request.

- Tenant notification fact sheets for specific air contaminants prepared by the DOH can be found at: <http://www.nyhealth.gov/environmental/indoors/air/contaminants/>.

- No exceptions are permitted even if the tenant(s)/occupants are aware of the contamination.

- Notice is not required from someone who is not defined as an “issuer” - such as

the test generated in the course of the landlord's own due diligence - even if the results exceed applicable guidelines.

- The key to reducing potential health risks and avoiding costly repairs and toxic mold litigation is educating property managers, maintenance staff and tenants about mold and mildew, establishing a program of regular building maintenance and developing a step-by-step protocol for building staff to respond to water intrusion issues, leaks and respond to mold complaints.

### **Step 1 – Education**

#### **Building Manager/Board of Directors**

- Develop a basic understanding about water and mold issues as well as an awareness regarding the urgency in addressing water issues as expeditiously as possible (Remember: the key to mold control is moisture control).

- Develop a working knowledge of the scope of insurance coverage; assess coverage periodically and update as needed.

- Develop a working knowledge of the respective maintenance and repair obligations of the tenants/shareholders and the building owner.

#### **Building Maintenance Staff**

- Develop a basic understanding about water and mold issues as well as the necessity of responding to leak and moisture complaints as expeditiously as possible.

- Develop a working familiarity with building procedures and protocols instituted to address water issues and mold complaints (see below).

#### **Tenants/Unit Owners**

- Encourage tenants to promptly report any evidence of water leakage, water intrusion or excessive moisture in the apartment,

any evidence of mold or fungi growth within the apartment that cannot be completely removed with a common household cleaner and/or any failure or malfunction of the HVAC equipment, ventilating systems and related equipment serving the apartment.

- Communicate regularly with tenants about the status of any building investigation and remediation, providing information about the nature of the problem (facts, not speculation), the remediation plan and timetable. If possible, identify a person with whom tenants can directly discuss their questions and comments regarding any remediation activities. (According to the both DOH and EPA guidelines, it is important to communicate with building occupants when mold problems are identified in the building as occupants' perceptions of the health risk may rise if they perceive that information is being withheld from them. "When building-wide communications are frequent and open, those managing the remediation can direct more time toward resolving the problem and less time to responding to occupant concerns." EPA "Mold Remediation in Schools and Commercial Buildings" Appendix C).

### **Step 2 – Establish a Program of Routine Inspections & Maintenance**

- Encourage building staff to monitor the property for signs of moisture, water damage and/or situations favorable to mold growth when conducting routine maintenance and repairs.

- Conduct random site checks in areas where water can cause potential problems such as the roof and building envelope.

- Institute a program of preventive maintenance for HVAC, plumbing, roofs, terrac-

es, windows and other building systems to help reduce water issues and the potential for mold growth. See, “Mold Prevention Tips” excerpted from EPA “Mold Remediation in Schools and Commercial Buildings” (copy annexed).

### **Step 3 – Develop Water & Mold Remediation Protocols**

• Develop routine procedures for building staff to follow when responding to water and mold complaints. See, “Water Damage – Cleanup and Mold Prevention” excerpted from EPA “Mold Remediation in Schools and Commercial Buildings” (copy annexed). At a minimum, these protocols should include:

- (i) Determine the source of the leak or the cause of the excessive moisture.
- (ii) Stop the leak/moisture and dry all affected areas completely within 24-48 hours.
- (iii) Thoroughly clean and dry the affected areas and remove all water damaged materials to prevent mold growth.
- (iv) If mold is either observed or smelled (musty odor), it should be remediated. (Note: it is generally not necessary to identify the types of mold involved through costly testing in order to remediate.)
- (v) If the mold condition is extensive (i.e. the total surface area of visible mold exceeds 100 sq. feet or the potential for resident/remediator exposure is estimated to be significant), consult an experienced professional with specific experience in mold projects to develop an appropriate remediation plan.

- (vi) Where mold has been identified, identify and correct the underlying source of the water intrusion – otherwise mold growth will recur.

### **Step 4 – Accurate & Detailed Record-keeping**

• Develop a standard protocol for documenting water and mold complaints whether through printed emails, telephone logs or formal building reports. Building records should not include any speculation or guesswork such as speculation about the cause of the leak or any alleged mold condition or the possible adverse health effects. Records should be limited to verifiable facts which include:

- (i) Date and time the leak or mold was first reported to management.
- (ii) What was done to investigate the complaint.
- (iii) All work performed by the maintenance staff to mitigate the damage.
- (iv) Name, date and time any outside professional was notified for consultation and the date and time the specialist addressed the problem.
- (v) Certification that the professional completed the work and corrected the problem (i.e. endpoint testing).



**Phyllis H. Weisberg, Esq.**  
Montgomery McCracken  
Walker & Rhoads LLP

437 Madison Avenue  
New York, NY 10022  
(212) 867-9500  
pweisberg@mmwr.com