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LAW OFFICES OF  
RICHARD A. FOGEL, P.C.

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present:  
**HON. ANGELA G. IANNACCI,**  
Justice

TRIAL/IAS, PART 18  
NASSAU COUNTY

**PAMELA DIAMOND,**

**Plaintiff(s),**

**-against-**

**MOTION DATE: May 14, 2010**

**MOTION SEQ.: 02**

**INDEX NO. 8652/07**

**AKA HOLDINGS LIMITED PARTNERSHIP,**

**Defendant(s),**

The following papers read on this motion:

Notice of Motion/Order to Show Cause	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, the motion by the defendant for an order granting it summary judgment dismissing the complaint in its entirety, is determined as hereinafter provided:

Initially, the claim that the defendant's expert affidavit should be rejected as untimely is denied. There was no order in this case requiring the exchange of expert information prior to the filing of the certification order and note of issue. CPLR 3101[d] does not require such disclosure. Accordingly, the standard to be applied is whether the delay was willful and whether there was any prejudice to the plaintiff (see Rowan v Cross County Ski & Skate Inc., 42 AD3d 563 [2d Dept. 2007]; Hernandez-Vega v Zwanger-Pesiri Radiology Group, 39 AD3d 710 [2d Dept. 2007]; Simpson v Tenore and

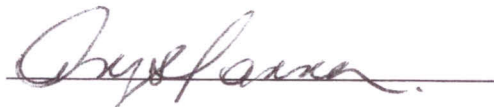
Guglielmo, 287 AD2d 613 [2d Dept. 2001]; Ruzycki v Baker, 9 AD3d 854 [4<sup>th</sup> Dept. 2004]). Here, the delay was not willful and there has been no prejudice to the plaintiff.

In order for a plaintiff to succeed on a claim for toxic substance exposure, he or she must establish: (1) level of exposure to the toxin; (2) general causation - that the toxin could in fact cause the alleged illness, and the level of exposure that would lead to such illness; and (3) specific causation - the likelihood that the specific toxin did cause the illness (see, Parker v Mobil Oil Corp., 7 NY3d 434 [2006]; Martins v Little 40 Worth Assocs., Inc., 72 AD3d 483 [1<sup>st</sup> Dept. 2010]). Here, the defendant met its burden of establishing its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff could not identify the specific toxin which caused her alleged injuries. In opposition, the plaintiff failed to submit sufficient evidence to create a triable issue of fact. The plaintiff's physicians' claims that her exposure to construction dust and debris was the cause of her symptoms are unsubstantiated and speculative (see McGrath v Transitional Servs. Of New York for Long Island, Inc., 63 AD3d 1121 [2d Dept. 2009]; DiDomenico v Long Beach Plaza Corp., 60 AD3d 618 [2d Dept. 2009]).

Accordingly, the motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: July 21, 2010



Angela G. Iannacci, J.S.C.

**XXX**