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SHORT FORM ORDER

COPY

INDEX No. 6653-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/21/11
ADJ. DATE 7/1/11
Mot. Seq. # 002 - MG; CDISP

CATHY BENJAMIN, Plaintiff, -against- KEYSPAN CORP., KEYSPAN ENERGY CORP. and KEYSPAN GAS EAST CORP., Defendants	REILLY, LIKE & TENETY, ESQS. Attys. For Plaintiff PO Box 818 Babylon, NY 11702 JOHN F. HASTINGS, ESQ. Atty. For Defendants 175 E. Old Country Rd. Hicksville, NY 11801

Upon the following papers numbered 1 to 8 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-6 ; Replying Affidavits and supporting papers 7-8 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#002) wherein the defendants seek dismissal of the plaintiff's complaint on grounds that the claims interposed herein are time barred is considered under CPLR 3211(a)(5) and CPLR 214-c(2) and is granted.

This action was commenced on February 28, 2011. It, like many others commenced in this court, arises out of claims that various parcels of real property were contaminated by the pollutants and toxic substances that escaped into the ground from a manufactured gas plant (MGP) situated in Bay Shore New York. The plaintiff is the owner of residential real property known as 97 Cooper Avenue, Brightwaters New York. She claims to have suffered injuries due to her "exposure' to toxic substances that contaminated her property, for which the defendants are alleged to be liable.

In the FIRST through SEVENTH causes of action set forth in the complaint, the plaintiff seeks recovery of money damages from the defendants under various theories including strict liability, trespass, negligence, and nuisance. The plaintiff seeks equitable relief in the form of medical monitoring and injunctive relief from the defendants in her EIGHTH cause of action and punitive damages in her NINTH cause of action.

8-30-11

By the instant motion, the defendants seek dismissal of each of the nine causes of action set forth in the complaint as time barred under the provisions of CPLR 214-c. For the reasons set forth below, the motion is granted.

It is well established that a defendant who moves for dismissal of claims upon grounds that they are time barred must make a prima facie showing that one or more causes of action set forth in the complaint are time barred under an applicable period of limitations (*see* ***Phillip F. v Roman Catholic Diocese of Las Vegas***, 70 AD3d 765, 894 NYS2d 125 [2d Dept 2010]; ***6D Farm Corp. v Carr***, 63 AD3d 903, 882 NYS2d 198 [2d Dept 2009]). Where such a showing is made, it is incumbent upon the plaintiff to aver evidentiary facts sufficient to establish that the statute is inapplicable due to an available exception or otherwise or that a question of fact exist with respect thereto (*see* ***Seift v New York Med. Coll.***, 25 AD3d 686, 808 NYS2d 731 [2d Dept 2006]; ***Santo B. v Roman Catholic Archdiocese of NY***, 51 AD3d 956 861NYS2d 674 [2d Dept 2008]).

The moving papers submitted by the defendants sufficiently established that the plaintiff's FIRST through SEVENTH causes of action are governed by the three year statute of limitations period set forth in CPLR §214-c, which provides, in relevant part, as follows:

> CPLR §214-c. Certain Actions to be commenced within three years of discovery
>
> > 1. In this section, "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation, or injection.
> >
> > 2. Notwithstanding the provisions of section 214, the three year period within which an to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances in any form, upon or within the body or within property, must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury could have been discovered by the plaintiff, whichever is earlier.

The fact that the THIRD, SIXTH and SEVENTH causes of action are predicated upon theories sounding in continuing trespass and nuisance does not bring them outside the reach and applicability of subparagraph 2 of CPLR §214-c (*see* ***Sheg v Agway, Inc.***, 229 AD2d 963, 645 NYS2d 687 [4th Dept 1996]; ***Pfohl v Amax, Inc.***, 222 AD2d 783, 635 NYS2d [4th Dept 1995]; *leave denied* 88 NY2d 1038, 651 NYS2d 12 [1996]). The claims advanced in the FIRST, SECOND, FOURTH and FIFTH causes of action, which sound in strict liability and negligence, are also subject to the limitations period set forth in CPLR §214-c or to the finite three year period set forth in CPLR 214(2) or (4) which is not subject to the extension afforded under the discovery provisions of CPLR 214-c.

Under the provision of CPLR 214-c, "[A]n action to recover for damage to property caused by the latent effects of exposure to any substance must be brought no later than three years from the date of discovery of the injury by the plaintiffs or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, whichever is earlier" (***Distefano v Nabisco, Inc.***, 282 NYS2d 704, 724 NYS2d 444 [2d Dept 2001], *citing* ***Jensen v General Elec. Co.***, 82 NY2d 77, *supra*). Discovery under CPLR §214-c occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based (*see* ***MRI Broadway Rental, Inc. v United States Mineral Prod. Co.***, 92 NY2d 421, 681 NYS2d 783 [1998]; ***Jensen v General Elec. Co.***, 82 NY2d 77, 603 NYS2d 420 [1993]). Where the record demonstrates that the plaintiff has knowledge of facts which would put a reasonable person on notice of the need to undertake further investigation into the contamination event, the plaintiff has three years from the date of the acquisition of that knowledge to commence suit under the discovery rule set forth in CPLR 214-c (*see* ***Oliver v Chevrolet Mobil Oil Corp.***, 249 AD3d 793, 671 NYS2d 850 [3d Dept 1998]).

Here, the record contains evidence that a dialogue between LILCO (a predecessor of one or more of the defendants) and the plaintiff began as early as 1998 when LILCO issued correspondence to the plaintiff advising that access to the plaintiff's property was necessary to install monitoring wells. The record also includes evidence that the plaintiff signed an access agreement allowing LILCO to install its monitoring devices. The record also contains evidence that in 2002, defendant Key Span, undertook a Private Well and Basement Survey in which the plaintiff actively participated. Said survey indicated that ground water might be infiltrating basements and that odors might accompany such infiltrations. The moving papers also included proof that Key Span sent the plaintiff a Fact Sheet mailing in early 2003 which identified a plume path in the vicinity of the plaintiff's home. In paragraph 12 of her complaint, the plaintiff admits that in 2004, a well which remains in her house, was capped by Key Span. The defendants thus contend that the plaintiff's claims are barred by the statute of limitations imposed upon the plaintiff's claims by CPLR § 214(c).

The opposing papers submitted by the plaintiff consist of an affirmation of her counsel and various exhibits. Counsel argues fervently that the plaintiff's claims are not time barred for various reasons including that the issue as to when a plaintiff should have discovered contamination event is generally considered one of fact. The court finds, however, that the circumstances of this case warrant a finding otherwise.

Here, the record demonstrates that the plaintiff had knowledge of facts which would put a reasonable person on notice of the need to undertake further investigation into the contamination event as early as 1998, or at the latest, in 2004, when Key Span capped a well in her house (*see* Complaint ¶ 12). That knowledge was sufficient to charge the plaintiff with discovery of the primary condition on which her claims are based (*see* ***MRI Broadway Rental, Inc. v United States Mineral Prod. Co.***, 92 NY2d 421, *supra*). It was also sufficient to place a reasonable person on notice of the need to undertake further investigation to ascertain the scope of the injury (*see* ***Oliver v Chevrolet Mobil Oil Corp.***, 249 AD3d 793, *supra*). Nothing suggests

that the plaintiff reasonably relied upon any deceptive acts or statements of the defendants or their agents which effectively prevented the plaintiff into commencing this action in a timely fashion (*see* ***Phillip F. v Roman Catholic Diocese of Las Vegas***, 70 AD3d 765, *supra*). The plaintiff thus had three years from the date of the acquisition of that knowledge to commence suit under the discovery rule set forth in CPLR §214-c (*see* ***Oliver v Chevrolet Mobil Oil Corp.***, 249 AD3d 793, *supra*). Since this action was commenced well after the passage of three years from the latest measure of the plaintiff's constructive knowledge of the event, *i.e*, the 2004 capping of the well in her house, the claims for damages that are set forth in the FIRST through SEVENTH causes of action set forth in the complaint are time barred.

Also time barred are the plaintiff's claims for equitable relief in the form of medical monitoring and an injunction. The moving papers of the defendants sufficiently established that the plaintiff's claims for medical monitoring and injunctive relief, to the extent they are not governed by the three year limitations period set forth are in CPLR 214-c, are too late under the six year time limitations period set forth in CPLR § 213(1). The plaintiff's NINTH cause of action, which is one for punitive damages is also subject to dismissal since it may not stand alone (*see* ***Brualdi v. IBERIA***, 79 AD3d 959, 913 NYS.2d 753 [2d Dept 2010]).

In view of the foregoing, the instant motion is granted and the plaintiff's complaint is dismissed pursuant to CPLR 3211(a)(5).

DATED: 8/26/11

THOMAS F. WHELAN, J.S.C.