SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 159201/2012
ZIC, VELIMIR
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10-21-13
OCT 21 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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VELIMER ZIC and MARILYN ZIC,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 159201/2012
Seq. No. 001

THE CITY OF NEW YORK; THE METROPOLITAN TRANSPORTATION AUTHORITY; THE NEW YORK CITY TRANSIT AUTHORITY; TISHMAN CONSTRUCTION CORPORATION; AECOM TECHNOLOGY CORPORATION; CITNALTA CONSTRUCTION CORP., JUDLAU CONTRACTING, INC.; THE NEW YORK TIMES COMPANY; FOREST CITY RATNER COMPANIES; FOREST CITY ENTERPRISES; AMEC CONSTRUCTION MANAGEMENT INC.; BOSTON PROPERTIES LIMITED PARTNERSHIP; QUEENS BALLPARK COMPANY, LLC; HUNT CONSTRUCTION GROUP; LEND LEASE CONSTRUCTION GROUP; LEND LEASE CORPORATION LIMITED f/k/a BOVIS LEND LEASE LMB, INC.; and TOTAL SAFETY CONSULTING,

Defendants.

----------X

KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 (Exhs. A-E)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant, the City of New York ("the City"), moves for an order pursuant to CPLR§ 3211(a)(7) (dismissal because the pleading fails to state a cause of action) and/or CPLR §3212,

(summary judgement), dismissing plaintiffs' Complaint as plaintiff Velimir Zic's claim is barred by the statute of limitations and is untimely. Plaintiffs oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion.

Factual and procedural background:

In his Notice of Claim, plaintiff asserts that "from on or before April 14, 2011, [been] employed as a painter, a paint abatement worker and foreman to perform work at the Thurgood Marshall U.S. Courthouse, the New York City Subway Station D line, the Brooklyn Navy Yard, the 59th Street Bridge." He alleges that during the course of his work, no proper contaminant monitoring was performed and that he was not provided with "proper ventilation and proper respirators and filters." This caused him to inhale "lead dust, lead fumes and carcinogens."

Consequently, in April 2011, a CT scan and a PET scan revealed an abnormality on the right upper lobe of his lung. Following a tissue biopsy, a diagnosis of squamous cell carcinoma and adenocarcinoma was confirmed. Thereafter, plaintiff underwent surgery for the removal of the right upper lobe of his lung. Plaintiff alleges that his exposure to these contaminants caused him to have "Lung Cancer, [for which he] underwent [a] right upper Lobectomy of the Lung in April 2011" and "Lead Poisoning." Additionally, plaintiff alleges that "[o]n April 24, 2012, he learned that the illnesses he suffered were the direct result of his work at said sites and time period." Plaintiff Velimir's wife, Marilyn, alleges loss of consortium.

Plaintiff Velimir alleges that from June 11, 2001 and continuing thereafter for almost ten years, as a member of Local 806 Bridge Painters Union, employed by L&L Painting Co., Inc., he was employed as a lead paint abatement worker, painter and foreman and was assigned to work at the

following sites: the Interlocking Track/Atlantic Avenue NEW YORK CITY TRANSIT AUTHORITY (NYCTA) project, from June 11, 2001 to August 9, 2004; the deck replacement on the Harlem River Drive, from December 16, 2002 to October 24, 2005; the Battery Maritime Building, from May 10, 2004 to October 17, 2005; the 59th Street Bridge, from July 26, 2004 to July20, 2009; The New York Times Building, from December 5, 2005 to January 8, 2007; the Bronx Park East (NYCTA) Station, from June 18, 2007 to August 13, 2007; the U.S. Post Office at 90 Church Street in New York County, from August 20, 2007 to April 7, 2008; Citi Field, from October 15, 2007 to May 11, 2009; the Brooklyn Navy Yard, from September 28, 2009 to October 19, 2009; the Rehabilitation of 7 Stations Project (NYCTA), West End Line, in Kings County, from January 11, 2010 to December 6, 2010; and the Thurgood Marshall U.S. Courthouse in New York County, from August 9, 2010 to April 18, 2011.

Plaintiffs allege that since the City owns, operates, manages and maintains the 59th Street Bridge, now known as the Ed Koch Queensboro Bridge, the Harlem River Drive, the Battery Maritime Building and the Brooklyn Navy Yard, it is responsible for the planning and supervising of all lead paint abatement, painting, demolition and construction activities occurring at the aforementioned dates and places.

Positions of the parties:

The City argues that plaintiffs' claims are barred by the statute of limitations in that General Municipal Law§50-e(1)(a) provides that the statute of limitations for tort claims against a municipality is one year and ninety days after the event occurred. It also argues that this one year and ninety day period applies to claims for exposure to contaminants and toxins and runs from the time at which plaintiff began to suffer manifestations or symptoms of his purported illness.

Thus, since the accrual of plaintiffs' claim here commenced with the onset of symptoms in January 2011, using the last day of the month, January 31, 2011, as the accrual date, the limitation period against the City expired on March 1, 2012.

The City also argues that plaintiffs' untimely Notice of Claim, served without leave of Court, is a mere nullity. It argues that plaintiffs did not file a Notice of Claim within 90 days of January 31, 2011, nor did they file a late Notice of Claim within the ensuing one year period. Rather, plaintiffs served their Notice of Claim fifteen months later, on June 27, 2012, followed by the filing of their Complaint, several months later. The City further argues that even assuming *arguendo* that if the date of diagnosis, April 14, 2011, was utilized as the date of accrual, plaintiffs Notice of Claim would still be deemed untimely in that they would have had to file same by July 13, 2011, or have sought leave to file a late one by July 13, 2012.

Plaintiffs respond that Velimer was diagnosed with lung cancer on April 14, 2011. Plaintiffs refer to and rely on various reports rendered by physicians as support for how they arrived at this date as the specific date of a definitive diagnosis. Plaintiffs refer to an "independent medical evaluation" conducted by Carl B. Friedman, M.D., "at the behest of the New York State Insurance Fund, probably associated with a workman's compensation application" (Aff. in Opp., p. 3, ¶2). Following a review of plaintiff's medical records, Dr. Friedman allegedly stated "[i]n my opinion, the patient's lung cancer is directly related to his occupational exposure to [these] carcinogens." Plaintiffs argue that because the aforementioned report which allegedly formulated Dr. Friedman's opinion was dated April 24, 2012, this is the date an actual diagnosis was rendered.

Moreover, plaintiffs refer to a subsequent report dated June 6, 2012, "of an independent pulmonary examination by Mitchell Horowitz, M.D" (*id.* p. 4, ¶¶ 3-4). Interestingly, Dr. Horowitz

allegedly states " Aside from his exposure as a painter, there is no other explanation why this gentleman developed lung cancer at such an early stage. Therefore, in my opinion, it is more likely than not that his exposure as a painter played a causal role in his development of lung cancer. However, I am unable to establish a definite causal relationship between his exposure and the development of lung cancer."

While plaintiffs concede that Dr. Horowitz could not, with any semblance of certainty, determine a causal connection between plaintiff's work and his cancer, plaintiffs still assert that "it is highly significant that these findings and conclusions were based upon the results of an independent medical evaluation and an independent pulmonary examination" (*id.* p. 5).

Plaintiffs argue that CPLR§ 214(c)(2) provides that the three year period within an action to recover damages for personal injury caused by the latent effects of exposure to any substance or a combination of substances, in any form, upon the body shall be computed from the date plaintiff discovers the injury or from the date through the exercise of reasonable diligence, such injury should have been discovered by plaintiff, whichever is earlier. Plaintiffs argue that Velimar "discovered his injury, lung cancer" on or about April 24, 2012, upon reading Dr. Friedman's report. Thus, plaintiffs served a timely Notice of Claim on or about June 27, 2012, within 90 days after the claim arose.

Conclusions of law:

When a notice of claim has not been served within the 90-day period specified in GML§ 50-e(1) of the General Municipal Law, an individual possessing a potential tort claim against a public corporation may also apply to the court pursuant to GML§50-e(5), for an extension of time within which to serve notice upon the respondent, and said application for the extension may be made

before or after the commencement of this action but not more than one year and ninety days after the cause of action accrued (*Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 258 [1980]; *Pierson v. City of New York*, 56 N.Y.2d 950, 954 [1982]).

In adopting CPLR§ 214–c, the goal of the Legislature was to "provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitations period had expired" (*Jensen v. Elec. Co.*, 82 N.Y.2d 77, 84 [1993]. CPLR§214--c (2) provides that the three year statute of limitations for injury caused by exposure to toxic substances "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 should have been discovered by the plaintiff, whichever is earlier."

"[T]he drafters of CPLR§214–c intended the term 'injury' to refer to an actual illness, physical condition or other similarly discoverable objective manifestation of the damage caused by previous exposure to an injurious substance," and there may be "separate and distinct disease processes [which] may constitute different injuries, each with its own time of discovery" (*Sweeney v. General Printing Inc. v. Div. of Sun Chemical Corp.*, 210 A.D.2d 865, 865-866 [3d Dept. 1995], *app denied* 85 N.Y.2d 808 [1995]).

The City argues that the statute of limitations for plaintiff's claim began to accrue when he first experienced symptoms of lung cancer. It refers to plaintiff's GML§ 50-h hearing wherein he testified that in January 2011, he began experiencing shortness of breath (Motion, Exh. B, p. 12, lines 20-23). While the City cites to several First Department cases wherein the respective courts held that the onset of manifestations or symptoms serve as the accrual date for toxic exposure claims, this Court finds the case of *Wetherill v. Eli Lilly & Co.*, 89 N.Y.2d 506, 513 [1997] to be both

instructive and compelling.

In Wetherill, the court stated: "We recognize that there may be situations in which the claimant may experience early symptoms that are too isolated or inconsequential to trigger the running of the Statute of Limitations under CPLR 214–c (2)." The Court also held that a "discovery of injury" occurs within the meaning of CPLR 214–c (2) when the plaintiff is diagnosed with the primary condition for which damages are sought (*id.* at p. 514).

In the case at bar, the Court rejects the City's argument that plaintiff should have associated his early symptoms of shortness of breath to his eventual diagnosis. Indeed, shortness of breath is a symptom that can be indicative of numerous diseases, conditions, or even something relatively innocuous. Plaintiff was officially diagnosed with lung cancer on April 14, 2011, the day he underwent the removal of a mass on his right upper lung. Although plaintiff would have the statute of limitations run from the date of Dr. Friedman's report, April 24, 2012, that report, at best, sets forth a causal connection between plaintiff's lung cancer and his work as a painter.

The Court finds that April 14, 2011, the day plaintiff was actually diagnosed with cancer, is the appropriate date from which to compute the statute of limitations. As the Court noted above, pursuant to Wetherill, the "discovery of injury," occurs within the meaning of CPLR§ 214–c (2) when plaintiff is diagnosed with the primary condition for which damages are sought (*id.* p. 514). Here, the primary condition was clearly diagnosed on April 14, 2011.

In the instant case, plaintiffs did not file their Notice of Claim within the statutorily mandated ninety days. Nor, did they seek leave to file a late Notice of Claim within the ensuing one year period. In consideration of this, the Court has no option but to grant the City's motion for summary judgment.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue, and it is further

ORDERED that the Trial Support Office is directed to reassign this case to the transit part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 21, 2013

ENTER:

OCT 21 2013

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT