[* 1]

SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190360/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

----------X

WILLIAM E. BARTEL, AND DAVID C. PEEBLES
administrators of the Estate of EUGENE QUINLAN,
deceased, and JULIE QUINLAN, individually Seq.003

Plaintiffs

-against-

MARINE TRANSPORT LINES, INC., WATERMAN
STEAMSHIP CORP. & JOHN CRANE INC.

Defendants

----------X

Marine Transport Lines, Inc. ("Marine") moves to dismiss plaintiffs' complaint based on the expiration of the statute of limitations. Plaintiffs oppose the motion arguing that they are entitled to equitable tolling of the statute of limitations. Plaintiff does not dispute that if equitable tolling does not apply, this action would be time-barred.

Plaintiff Eugene Quinlan ("Quinlan" or "plaintiff"), a career merchant mariner, originally filed a 1997 complaint in the Northern District of Ohio for non-malignant asbestos disease through his attorneys The Maritime Asbestosis Legal Clinic, a Division of the Jaques Admiralty Law Firm (the "Maritime Asbestos Clinic").[1] The complaint essentially sought damages "in excess of

[1]The firm of Motley Rice LLC is co-counsel with the Jacques Admiralty Law Firm, P.C. in this action. Motley Rice LLC appeared in September, 2011 for all plaintiffs "in the active Jaques MARDOC cases" in the Eastern District of Pennsylvania (NYSCEF Document No 77). The extent of Motley Rice LLC's involvement in plaintiff's case prior to 2011, if any, has not

$75,000" for (1) exacerbation of plaintiff's "existing diseases" without further specification, (2) fear of developing cancer, and (3) the need for future health monitoring.[2] Quinlan was later diagnosed with lung cancer in 2002 and died on April 2, 2003 at 78 years of age. His attorneys maintain that Quinlan's death was caused by asbestos exposure.

After the complaint was filed, the action was assigned to MultiDistrict Litigation ("MDL") 875, which is the federal equivalent of this court's NYCAL. The MDL included all "MARDOC" cases (Maritime Docket cases) and Quinlan's action was a MARDOC case. After lying dormant for seventeen years, Quinlan's action ended up before Judge Eduardo C. Robreno in the Eastern District of Pennsylvania.[3] On March 11, 2014 Judge Robreno dismissed plaintiff's 1997 action (among many others) for lack of personal (long arm) jurisdiction over Marine in Ohio, where the case was originally filed (*see In Re Asbestos Prod. Liab. Litig* (No VI), 2014 US DIST LEXIS 33768 [ED NY 2014]). Plaintiff's claims against certain other defendants remain pending in the MDL 875. Plaintiffs filed a complaint in this Court on September 16, 2014 against Marine and four other

---

been addressed.

[2]Plaintiff refers to his "existing disease" and additionally asserts he "[s]uffers anatomical disorder, structural changes, pulmonary diseases inclusive of asbestosis/ mesothelioma/ lung cancer/ cancer/ stomach cancer/ rectal cancer/ kidney cancer/ pancreas cancer/ pharynx cancer/ brain cancer/ other anatomical cancer/ et cetera, either singularly or in combination thereof" (*see* NYSCEF Exh 101, Plaintiff's Complaint).

[3]28 U.S.C. § 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but provides that the Panel "shall" remand any such action to the original district "at or before the conclusion of such pretrial proceedings." 28 U.S.C. § 1404 (entitled Change of venue) provides in relevant part "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

defendants.

Plaintiffs seek equitable tolling of the statute of limitations on the basis that Marine misled the Maritime Asbestos Clinic into believing that Marine had waived its personal jurisdictional objections (which, as Judge Robreno found, was not the case). Plaintiffs also seek tolling because the federal courts delayed deciding the jurisdictional issue for nearly two decades. If the issue of jurisdiction was promptly considered by the court, plaintiffs assert that they would have had ample time to re-file the action in another jurisdiction. Further, plaintiffs complain that they were deprived of the right to a decision on the merits in the transferee forum. While Judge Thomas Lambros of the Northern District of Ohio directed that various cases be transferred out of Ohio to other jurisdictions in 1989 (*see* discussion *infra*), Judge Robreno determined in 2014 that transfers of cases out of Ohio to another forum for trial were precluded based on a Supreme Court case decided five years after Quinlan filed his action (*see Lexecon, Inc. v Milberg, Weiss, Bershad, Hynes & Lerach,* 523 US 26 [1998]).

Highlights of Federal MultiDistrict Litigation 875

A brief history of federal asbestos litigation is necessary in order to understand how nothing could happen in a 1997 action until 2014, when Quinlan's action was dismissed against Marine and other defendants for lack of personal jurisdiction.[4] At oral argument, plaintiffs referred to the federal courts practice of placing asbestos cases into a "black hole" while Marine used the phrase "cold storage."

More than ten years prior to filing plaintiff's complaint, the Maritime Asbestos Clinic had

---

[4]Nothing happened in this seventeen year time period other than plaintiff's amendment of his complaint in 2004.

filed hundreds of seamen cases in the Northern District of Ohio. In 1989, many shipowner's moved to dismiss hundreds of cases pending in Ohio for lack of (long arm) jurisdiction. By Order dated November 22, 1989, Judge Lambros indicated that, for cases where Ohio lacked jurisdiction, plaintiffs should report back with a factual basis to support jurisdiction elsewhere, and, those cases would be transferred to those jurisdictions (NYSCEF Document No. 109, Order dated November 22, 1989). Then, pursuant to Order No. 41, because jurisdiction was lacking in Ohio, hundreds of cases were "transferred to the jurisdictions which plaintiffs represent have sufficient contact to sustain the choice of that in personam jurisdictional forum" while other cases not subject to the Order were directed to file answers (NYSCEF Document No. 110, Order dated December 29, 1989).

However, despite Order No. 40 and Order No. 41, the parties agree that the purported transferred cases remained in the Northern District of Ohio. This may have occurred because no severance orders were prepared specify which claims were transferred, as against which defendants, given that in any one action (of which there were 945) certain defendants were subject to Ohio's jurisdiction and would not be transferred, while other defendants would be transferred.[5] Shipowners filed motions to certify Orders No. 40 and 41 for interlocutory appeal because they believed that Judge Lambros had no legal authority to transfer cases over which Ohio had no jurisdiction. Apparently, Judge Lambros never decided the motion. The Maritime Asbestos Clinic then filed a Motion to Transfer in Toto, the purpose of which was to avoid the splintering of plaintiffs' actions

---

[5]Judge Robreno stated that "[u]ltimately and for no reason apparent on the record, Judge Lambros did not issue severance orders identifying which claims and defendants were being transferred. . . Therefore, although the cases were ordered "transferred," in reality, they were never transferred to other jurisdictions and remained on the docket of the Northern District of Ohio until they were transferred and consolidated into MDL 875 beginning in 1991" (NYSCEF Document No. 126).

into multiple forums by transferring all of the defendants in a single action to a single forum, regardless of whether the transferee court would have initially had jurisdiction over all defendants. That motion was denied in April 1990.

In July 1991, MDL 875 was established to centralize asbestos personal injury cases which flooded the court (at that time over 30,0000 cases) (*see In re Asbestos Products Liability Litig.*, 771 F Supp 415 [Jud. Panel of MultiDistrict Lit. 1991]). In 1991, the Judicial Panel of MultiDistrict Litigation transferred all pending asbestos actions outside of the Eastern District of Pennsylvania and not on trial (and later filed cases) to Judge Charles Weiner in the Eastern District of Pennsylvania (*see In Re Asbestos Prod. Liab. Litig.* (No VI), 771 F Supp 415 [JPML 1991]). In 1993, shipowners again filed personal jurisdiction dismissal motions by filing the motion in the transferor court, with a copy to the transferee judge. In 1995, Judge Weiner issued Administrative Order No. 5 (Mardoc) which denied all motions to dismiss and motions for summary judgment without prejudice to renew at trial in order to "reduce paperwork and expenses being borne by the Court and by the parties" (NYSCEF Document No. 43, Order dated February 6, 1995).

In May 1996, Judge Weiner "administratively dismissed without prejudice and with all statutes of limitations tolled"[6] all MARDOC cases filed in the Northern District of Ohio, but provided that any case could be reinstated upon evidentiary proof (NYSCEF Document No 102, Order dated May 2, 1996). The order provided for reinstatement as follows:

> 1. Each plaintiff requesting reinstatement must provide to this Court satisfactory evidence that the plaintiff has an asbestos-related personal injury compensable under the law.
> 2. For each defendant which the plaintiff desires to pursue, the plaintiff must provide probative evidence of exposure to products connected to, or supplied, manufactured or

[6]The court's power to toll the statute of limitations is unclear.

> installed by said defendant, or, if the defendant is a shipowner, evidence of service upon the defendant's ship(s).

Plaintiff's counsel did not appeal this decision, which provided that "[f]or the purposes of appeal, THIS IS NOT A FINAL ORDER" (*id.*).[7] The scope of this Order was expanded on March 17, 1997 (NYSCEF Document No 103). The Maritime Asbestos Clinic never moved to reinstate plaintiff's claim by proffering evidence of a compensable asbestos-related injury and evidence of asbestos exposure. Instead, both plaintiff's and defendants' counsel, and the court, were content in allowing plaintiff's case remain on inactive, among with so many others cases.[8]

In May 1997, both the Maritime Asbestos Clinic and shipowners' counsel met in London England to discuss global resolution of the maritime asbestos cases, which was unsuccessful. In January 2002, Judge Weiner issued Administrative Order No. 8 which stayed cases, and again included the right of restoration based upon evidence of asbestos exposure (*see* Administrative Order No 8 available at http://www.paed.uscourts.gov/documents/MDL/MDL875/adord8.pdf). That order was later vacated by Judge Robreno on July 17, 2009 (*see* Administrative Order No. 19 available at http://www.paed.uscourts.gov/documents/MDL/MDL875/adord19.pdf). Judge Robreno noted that the "problem of massive filings of new cases which would clog the docket, taking time and money away from the most seriously ill or most deserving plaintiffs" no longer existed in MDL 875 and "the efficient administration of MDL 875" was no longer served by Administrative Order No. 8. On

---

[7]Judge Weiner also noted that 17,000 seamen cases had been filed without payment of filing fees under a prior court policy and "the burden and cost to the court system has been considerable." He directed that this policy stop, and that plaintiff law firms pay filing fees in each individual case.

[8]However, on June 2, 2004, over one year after Quinlan passed away, plaintiff's counsel amended his complaint.

March 11, 2014, Judge Robreno dismissed plaintiff's 1997 action, among others, for lack of personal (long arm) jurisdiction over Marine in Ohio, where the case was originally filed seventeen years before (NYSCEF Document No 126, Order dated August 26, 2013).

Marine's Arguments

Defendant asserts that equitable tolling is only warranted in rare and exceptional circumstances not present here. Plaintiff has not demonstrated that he has been diligent in pursuing his rights and he has not shown that any extraordinary circumstance stood in the way of a timely filing, as required under *Bolarinwa v Williams* (593 F3d 226 [2d Cir 2010]). Defendants fault the Maritime Asbestos Clinic for pressing its discredited "National Contacts" theory in 1989 as the basis for jurisdiction in Ohio when the firm knew that the Supreme Court had rejected such a theory in 1987 in *Omni Capital Int'l, Ltd. v Rudolf Wolff & Co.*, 484 US 97 [1987] [absent a statute which authorizes nationwide service of process, long arm jurisdiction over the defendant must exist; the Commodities Exchange Act did not authorize nationwide service and therefore the court had no jurisdiction over a broker and an agent because the requirements of the long arm statute were not met]).[9] Further, the Maritime Asbestos Clinic knew that Judge Lambros rejected the firm's "National Contacts" theory in 1989 (and plaintiff doesn't dispute this). Yet, plaintiff's complaint was filed by the Maritime Asbestos Clinic in Ohio eight years after Judge Lambros rejected that theory. Further, after Judge Lambros rejected that theory, the firm continued to file an additional 7,474 cases in Ohio against Marine and, by 2009 the firm had filed over 50,000 cases against shipowners in Ohio, as noted in *In re Asbestos Prod. Liab. Litig.* (No VI), 965 F Supp 2d 612, 615

---

[9]The Maritime Asbestos Clinic argued that the Jones Act focuses on defendants' contacts with the United States as a whole, and therefore shipowners could be sued in any state, regardless of the jurisdictional contacts. This argument was known as the "National Contacts" theory.

[ED Pa 2013]).[10] Citing *Asbestos Claimants v U.S. Lines Reorganization Trust*, 318 F3d 432 [2d Cir 2002]), Marine asserts that the due diligence standard applies not only to plaintiff, but to his counsel as well. Marine cites to several cases holding that even reasonable mistakes of attorneys cannot support equitable tolling (*see, e.g., Irwin v Dept. of Veteran Affairs*, 498 US 89, 96 [1990]). Here, Marine asserts that the mistake was actually intentional. Additionally, Marine cites to cases in the Fifth and Eighth Circuits, noting that the Circuit courts have not resolved the issue of whether equitable tolling can apply where a case has been dismissed for lack of jurisdiction (as opposed to venue for example).[11] However, without reaching the issue, those cases have denied tolling based on the plaintiffs' failure to establish due diligence. Marine also argues that plaintiffs are barred by collateral estoppel from re-litigating the issue of Marine's waiver of its jurisdictional defense.[12]

Plaintiffs' Arguments

Plaintiffs paint a different picture. The Maritime Asbestos Clinic filed cases in Ohio based on the firm's belief that there existed a "well known understanding and agreement among the parties to litigate maritime asbestos personal injury cases in a single forum, Ohio" (Plaintiff's Opp at 1). The Maritime Asbestos Clinic points to evidence that lured the firm into relying on purported

---

[10]In 2013 and 2014, the MDL court issued three orders dismissing over 10,000 personal jurisdiction dismissals in favor of hundred of shipowners in cases filed by the Maritime Asbestos Clinic in Ohio (*see In re Asbestos Prod. Liab. Litig.* (No VI), 965 F Supp 2d 612 [ED Pa 2013]; *In re Asbestos Prod. Liab. Litig.* (No VI) US DIST LEXIS 33768 [ED Pa 2014]; *In re Asbestos Prod. Liab. Litig.* (No VI) US DIST LEXIS 136679 [ED Pa 2014]).

[11]Plaintiffs cite *Burnett v New York Central RailRoad Co.* (380 US 424 [1965]) but that cases applied equitable tolling in an instance where jurisdiction was proper, but venue was lacking.

[12] Plaintiffs are not seeking to re-litigate the waiver issue, but rather seek equitable tolling. However, to the extent that some arguments are inartfully drafted to appear to seek re-litigation of whether personal jurisdiction was waived, they are disregarded.

representations that defendants would not contest jurisdiction in Ohio (*id.*). Plaintiffs point to 1989 statements from Thompson, Hine & Flory (the "Thompson firm") to the effect that those defendants whose motions to dismiss were denied might agree to waive jurisdiction (*id.* at 4).[13] Plaintiffs point to the Thompson firm's opposition papers to the Maritime Asbestos Clinic's motion to Transfer in Toto, which reflects that several non-resident defendants not subject to Ohio jurisdiction agreed to waive jurisdiction in order to take advantage of Ohio's consolidated handling of the cases (*id.* at 5-6). Plaintiffs point to one instance where Ohio transferred a case to the Eastern District of Michigan but the defendants objected on the basis that they had waived jurisdiction, which resulted in the cases being transferred back to Ohio (*id.* at 6-7).

Plaintiffs also assert that the understanding was also "on a going forward basis" (*id.* at 7). Plaintiffs points to a Special Master's comment regarding her recollection that the Thompson firm informed Judge Lambros that "a large majority of their clients" had "desired" to waive jurisdiction and of counsel's "intent not to object on an ongoing basis" (*id.* at 7). The Special Master also recalled an agreement between Leonard C. Jaques and Thomas O. Murphy of Thompson, Hine & Flory (both now deceased) that cases could continue to be filed in Ohio without defendants "threatening to file motions to dismiss or motions to transfer based on lack of personal jurisdiction" (*id.* at 8). Another brief filed by the Thompson firm in opposition to a motion to transfer concluded that if a transfer were to take place, then it should be to the Northern District of Ohio where procedures were in place to efficiently manage asbestos cases (*id*). Moreover, Quinlan was actively misled because shipowners filed a Master Answer in Ohio -albeit after being directed by Judge

---

[13]Thompson Hine, LLP. represents co-defendant Waterman Steamship Corp. That firm has made a similar motion to dismiss under motion sequence 004, and a decision was also issued today.

Lambros to do so and containing the defense of lack of jurisdiction. Additionally, in May 1997, both the Maritime Asbestos Clinic and the Thompson firm and other counsel met in London to discuss global resolution of the maritime asbestos cases, which was unsuccessful. In plaintiffs' eyes, shipowners were content to follow this jurisdictional arrangement until 1998, when they could move to dismiss cases under *Lexecon, Inc. v Milberg, Weiss, Bershad, Hynes & Lerach,* 523 US 26, *supra* [28 U.S.C.S. § 1407 (a) did not permit a transferee court to entertain a 28 U.S.C.S. § 1404(a) transfer motion to keep the case for trial; self-assignment was beyond the scope of the transferee court's authority]). It was not fair, plaintiffs argue, that Judge Robreno relied upon law not in existence at the time that Quinlan's case was filed.[14] Additionally, plaintiffs' counsel correctly points out that seamen are regarded as wards of the court and should be entitled to every benefit, citing *Evans v Nicholson Transit Co.*, 58 F Supp 82, 83 [Dist. Ct. Northern Dist. Ohio 1944]).

Discussion

This decision is not about whether Marine bears any responsibility for plaintiff's illness and death. This decision is not about whether the Maritime Asbestos Clinic's representation of Quinlan took a back seat to the Clinic's volume business strategy.[15] This decision is about whether plaintiffs

---

[14]Marine argues that Judge Robreno did not rely on new law that was not in existence when the Maritime Asbestos Clinic filed Quinlan's complaint. While this is not entirely true, it is of no import here. Plaintiffs' counsel may pursue any avenue of appeal of Judge Robreno's decision available to them. Additionally, it is unreasonable for the Maritime Asbestos Clinic, who knew about the decades of delay, to have any expectation that cases would be decided in any particular way.

[15]This court's criticism of the Maritime Asbestos Clinic is not directed towards the attorney who appeared for oral argument on behalf of the Jacques Admiralty Firm. He indicated on the record that he had no direct personal involvement in the decision that the Maritime Asbestos Clinic made many years ago regarding the Ohio litigation. The quality of the papers from both sides is excellent but for plaintiffs it is too little, too late. Quinlan is still involved with ongoing litigation, but it is not clear whether his case will ever be decided on the merits.

are entitled to an equitable toll of the statute of limitations under the circumstances, where Quinlan's complaint was dismissed based on the lack of jurisdiction. The problem with plaintiffs' arguments is that they ignore the prior actions and inactions of their counsel.

The well-settled and limited circumstances for equitable tolling of the statute of limitations are summarized as follows: (1) the plaintiff timely filed the complaint in the wrong forum, (2) the defendant actively misled the plaintiff, or (3) the plaintiff in some extraordinary way had been prevented from complying with the limitations period (*see O'Hara v Baylimer*, 89 NY2d 636 [1997] [decided under federal law]). New York law is substantially similar (*see Shared Comm. Servs. of ESR, Inc. v Goldman Sachs & Co.*, 38 AD3d 325 [1st Dept 2007] [denying equitable tolling of under New York's and Pennsylvania's state law based on the concept generally applied to federal causes of action in New York because the plaintiff did not demonstrate that it was actively misled by defendant, or had been prevented from complying with the limitations period in some extraordinary way]).

The due diligence standard applies not only to plaintiff, but to his counsel as well (*see Asbestos Claimants v U.S. Lines Reorganization Trust*, 318 F3d 432, *supra*). Thus, where an individual is represented by counsel during the period in which the statute of limitations runs, equitable tolling has been denied (*see Keyse v. Cal. Tex. Oil Corp.*, 590 F2d 45, 47 [2d Cir 1978]; *Smith v. Am. President Lines, Ltd.*, 571 F.2d 102, 109-10 [2d Cir 1978]; *Economou v. Caldera*, 286 F.3d 144, 146 n.1 [2d Cir 2002]).

Plaintiffs demonstrated that they timely filed the complaint in the wrong forum, but have failed to demonstrate that Marine actively misled them. Nor have plaintiffs shown that in some

---

Accordingly, it is unclear whether the Maritime Asbestos Clinic can ever rectify its prior wrongs.

extraordinary way that Quinlan was prevented from complying with the limitations period.[16] It is certainly true that the federal courts delayed deciding the jurisdictional issue for nearly two decades, which was an extraordinary, unprecedented situation for thousands of plaintiffs seeking judicial access. However, the Maritime Asbestos Clinic made the initial decision to file thousands of asbestos cases in Ohio and, to continue filing them after the landscape had changed. Had the Clinic only filed cases in Ohio where personal jurisdiction existed, the federal courts' seventeen year delay in deciding the personal jurisdiction motion would not have been fatal. Even when Quinlan developed lung cancer, the Maritime Asbestos Clinic did not attempt to discontinue Quinlan's claim against Marine in order to bring an action in the proper jurisdiction.

In a scathing decision from the Second Circuit involving the Maritime Asbestos Clinic, the Court upheld the lower court's finding that the statute of limitations had expired and equitable tolling was not available (*Asbestos Claimants v U.S. Lines Reorganization Trust*, 318 F3d 432, *supra)*. The court cited numerous failures by the Maritime Asbestos Clinic in producing evidence on behalf of clients in order to pursue a path of "sheer volume" with a hope that the volume would force a settlement (*id.* at 434). The Second Circuit cited to another case where it noted counsel's "dilatory volume strategy" (*id.* at 435).

While this court recognizes that the nature of asbestos litigation means that a large number of defendants may be sued in any one action, which might force a plaintiff to sue in multiple forums in order to obtain jurisdiction, the Maritime Asbestos Clinic ignored jurisdictional requirements for the sake of volume business. Even if the firm originally had a sound legal reason to believe in its

---

[16]Therefore, this court need not reach the issue of whether equitable tolling can apply to an action which has been dismissed for lack of jurisdiction.

"National Contacts" theory, the Maritime Asbestos Clinic continued to file cases in Ohio after Judge Lambros rejected the firm's theory. The firm purportedly did this based on an alleged "well known understanding and agreement among the parties to litigate maritime asbestos personal injury cases in a single forum, Ohio." While plaintiffs' counsel certainly proffered evidence that reflected that many shipowners did in fact waive jurisdiction in favor of consolidated litigation in Ohio, it is shocking that the Maritime Asbestos Clinic did not obtain a written agreement memorializing this "understanding." It is even more outrageous to believe that an agreement existed for future cases. How defense counsel would have authority to agree to anything involving a future, unfiled action, is puzzling.[17] Additionally, while shipowners filed a Master Answer in 1995 in Ohio, it was because they were directed to do so by Judge Lambros and the Master Answer contained the defense of lack of jurisdiction. Plaintiffs' counsels' argument that they were misled or prevented from making a timely filing rings hollow.

It is hereby

ORDERED that the motion to dismiss is granted: and it is further

ORDERED that upon service of a copy of this Decision and Order on the appropriate e-filing clerk using the appropriate e-filing form, the Clerk of the Court is directed to sever defendant Marine Transport Lines, Inc. from the action and enter judgment in favor of said defendant dismissing

---

[17]Attorneys engaged in volume business run the risk of becoming "mills" which reminds the court of the foreclosure mill Steven. J. Baum, P.C. While that firm was alleged to have engaged in duplicitous practices not present here (*see* www.ag.ny.gov/press-releases), it is obvious that many problems flowed from the Maritime Asbestos Clinic filing of many thousands of cases in the manner that it did.

the complaint as against that defendant, without costs and disbursements.

**This constitutes the Decision and Order of the Court.**

Dated: December 10, 2015

J.S.C.

HON. PETER H. MOULTON