Vorce v Wood
2018 NY Slip Op 33460(U)
March 13, 2018
Supreme Court, Albany County
Docket Number: 900091-2016
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SIDNEY VORCE and THOMAS VORCE,
Plaintiffs,

-against-

MICHAEL J. WOOD,
Defendant.

DECISION/ORDER

Index No. 900091-2016
RJI No. 01-17-126562

APPEARANCES:

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RYBA J.,

During the period of 1992 through 1995, plaintiffs were young children residing with their parents in an apartment owned by defendant at 178 Congress Street in the City of Cohoes. On January 19, 2016, plaintiff Thomas Vorce, then 24 years old, commenced this action alleging that he sustained cognitive injuries as a result of his exposure to lead while he resided at the Congress Street apartment. Defense counsel requested and obtained an unlimited extension of time to serve an answer while attempting to engage in settlement negotiations. On June 20, 2016, before defendant's extension of time to interpose an answer expired, plaintiff Thomas Vorce served an amended complaint which added his older brother, Sidney Vorce, then 28 years old, as a plaintiff. On May 15, 2017, defendant served an answer denying liability and asserting various affirmative defenses including the expiration of the Statute of Limitations and the failure of Sidney Vorce to

properly commence his action. Notably, the parties have not engaged in any discovery to date. Defendant now moves for an order dismissing the complaint as barred by the Statute of Limitations, as well as an order dismissing Sidney Vorce's claim as improperly commenced. Plaintiffs oppose the motion.

Defendant first contends that Sidney Vorce was improperly added as a plaintiff through service of an amended complaint without leave of Court or stipulation of the parties, and that a separate action using a new index number was required. CPLR 1003 provides that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, *or once without leave of court* within twenty days after service of the original summons or *at anytime before the period for responding to that summons expires* or within twenty days after service of a pleading responding to it" [emphasis supplied]. Here, although it is undisputed that neither leave of Court nor stipulation of the parties was obtained prior to service of the amended complaint, it is also undisputed that defendant obtained an unlimited extension of time for serving an answer the original complaint and that the responsive time had not yet expired when the amended complaint was served. Accordingly, pursuant to CPLR 1003, an amended complaint could be served without first obtaining leave of Court or a stipulation of the parties. Defendant's motion to dismiss Sidney Vorce's claim as improperly commenced is therefore denied.

Defendant next moves to dismiss the complaint as untimely. It is well settled that the three-year Statute of Limitations applicable to personal injury actions begins to run upon the date of the injury, but with respect to an infant plaintiff the three-year period will not commence to run until the infant's 18th birthday (see, CPLR 214; CPLR 208). Applying these provisions to the case

at bar, the three-year Statute of Limitations had long since expired when plaintiffs commenced this action at the respective ages of 24 and 28. However, because plaintiffs' claims are premised upon latent injuries sustained as the result of their alleged exposure to a toxic substance, they may seek to extend the Statute of Limitations through the discovery rule pronounced in CPLR 214-c.

Pursuant to CPLR 214-c (2), the three-year limitations period in toxic tort cases "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" (CPLR 214-c [2]; see, Matter of New York County DES Litig., 89 NY2d 506, 511 [1997]; Vasilatos v Dzamba, 148 AD3d 1275, 1276–77 [2017]; Aiken v General Elec. Co., 57 AD3d 1070, 1072 [2008]). In addition, CPLR 214-c (4) may extend the Statute of Limitations one year from the date a plaintiff discovers the cause of the injury, but not more than five years after discovering the injury itself. However, this latter extension applies only upon proof that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" (CPLR 214–c[4]).

As the proponent of the motion herein, defendant bears the burden of making a prima facie demonstration that applicable limitations period has expired (see, Vasilatos v Dzamba, 148 AD3d 1275, 1276–77 [2017]; Larkin v Rochester Hous. Auth, 81 AD3d 1354, 1355 [2011]). On the issue of whether the discovery rule set forth in CPLR 214-c (4) operates to extend the Statute of Limitations in this case, the Court finds that the extension is inapplicable here. In the case of claimed injuries caused by lead paint exposure, it cannot be shown that the "technical, scientific or medical knowledge and information sufficient to ascertain the cause of [plaintiff's] injury had not been discovered, identified or determined" (CPLR 214–c[4]). Indeed, it is well settled that

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"[t]he dangers of exposure to lead-based paint, especially to young children, are well documented" (Matter of New York City Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 342 [2003]; see, Juarez v Wavecrest Mgt. Team, 88 NY2d 628, 640–641 [1996]; Vasilatos v Dzamba, 148 AD3d at 1278–79 [2017]). Plaintiffs cannot legitimately claim that their failure to commence this action sooner was due to the lack of scientific knowledge linking lead-based paint exposure in children to the type of cognitive injuries alleged herein.

Regarding the discovery toll set forth in CPLR 214-c (2), defendant will succeed in demonstrating that plaintiffs' action is untimely by submitting evidence that it was commenced more than three years from the date that plaintiffs discovered or reasonably should have discovered their respective symptoms. The Court rejects the notion, advanced by plaintiffs, that the three-year period runs from the date that plaintiffs realized that their symptoms were caused by lead paint exposure. The Appellate Division, Third Department has specifically held that "the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, *not the discovery of the specific cause of the condition or symptom*" (Vasilatos v Dzamba, 148 AD3d 1275, 1278 [2017] [emphasis supplied]). Finally, the Court rejects plaintiffs' argument that the information set forth in their medical and/or educational records cannot show that they possessed the knowledge sufficient to trigger the commencement of the three-year period because the records do not identify lead paint exposure as the cause of their symptoms. Although the educational records of the plaintiff in Vasilatos v Dzamba referenced lead-paint exposure as the possible cause of her injuries, this difference is not dispositive. As previously discussed, the Appellate Division, Third Department specifically held in Vasilatos v Dzamba that it is the plaintiff's knowledge of the *injury itself*, not the *cause* of the injury, that triggers the limitations

period. Indeed, there is no indication that the plaintiff in Vasilatos v Dzamba was even aware that such a notation existed in her educational records.

Addressing the substance of defendant's motion, upon examining the moving papers the Court concludes that they do not satisfy defendant's initial burden. Defendant has failed to submit evidence to establish the date that plaintiffs discovered their respective injuries, or the date upon when such injuries should have been discovered with reasonable diligence. Significantly, however, the parties have yet to engage in any discovery and defendant has not been afforded the opportunity to obtain documents and testimony which may reveal whether and to what extent plaintiffs were cognizant of their respective injuries. Moreover, the proof submitted by plaintiffs in opposition to defendant's motion contain selected excerpts from plaintiffs medical and educational records which seem to reveal that plaintiffs were or reasonably should have been aware of the injuries claimed in this action, i.e, loss of intelligence, distractibility, impulsivity, learning disabilities and oppositional behavior. Defendant has specifically requested the opportunity to conduct discovery so that plaintiffs may be deposed and their complete educational and medical records may be examined. Inasmuch the timeliness of plaintiffs' claims hinges entirely upon the date when they knew or reasonably should have known of their symptoms, discovery is indispensible to the determination of whether this action is time barred. Accordingly, defendant's motion is denied as premature, without prejudice, subject to renewal upon the completion of discovery.

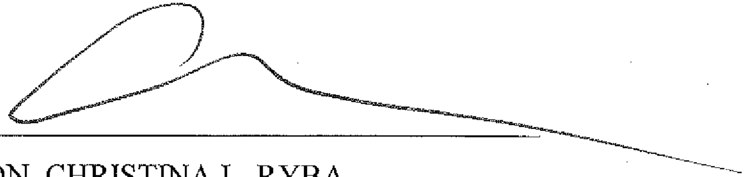
For the foregoing reasons, it is

ORDERED the motion is denied, without costs and without prejudice to renewal upon the completion of discovery.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for plaintiffs. The original papers are being transferred to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER.

Dated: March 13, 2018



HON. CHRISTINA L. RYBA
Supreme Court Justice