

<b>Seen v 84 Lumber Co.</b>
2019 NY Slip Op 33357(U)
November 8, 2019
Supreme Court, New York County
Docket Number: 190225/2018
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ PART 13**  
*Justice*

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

**SINAR SEEN, Individually and as Temporary  
Administrator of the Estate of MUNIR SEEN,  
deceased,**

**Plaintiffs,**

**- against -**

**84 LUMBER COMPANY, *et al.*,**

**Defendants.**

INDEX NO. 190225/2018  
MOTION DATE 10/23/2019  
MOTION SEQ. NO. 004  
MOTION CAL. NO.

**-----  
AND RELATED THIRD-PARTY ACTION.**

The following papers, numbered 1 to 5 were read on defendant KAISER GYPSUM COMPANY, INC.'s motion to dismiss pursuant to CPLR§ 3211(a)(5) on the ground that the statute of limitations bars plaintiff's claims :

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 2
Answering Affidavits — Exhibits _____	3-4
Replying Affidavits _____	5

**Cross-Motion:      Yes    X No**

Upon a reading of the foregoing cited papers it is Ordered that defendant KAISER GYPSUM COMPANY, INC.'s (hereinafter "KAISER") motion to dismiss pursuant to CPLR§ 3211(a)(5) on the grounds that the statute of limitations bars plaintiff's claims is denied.

Plaintiff, Munir Seen, was diagnosed with mesothelioma on February 16, 2016 from his alleged exposure to asbestos-containing products when he worked as a drywaller, laborer, and carpenter from about 1967 through 1980. It is alleged-as relevant to this motion- that while performing this work from approximately 1969 through the mid-1970s Mr. seen was exposed to Kaiser's asbestos-containing joint compound. Mr. seen died from this disease on July 2, 2019.

Kaiser filed for Bankruptcy under chapter 11 of Title 11 of the U.S. Bankruptcy Code on September 30, 2016 (see Exhibit 1). On October 3, 2016 Kaiser served New York City Asbestos Litigation "Notice of Pendency of Bankruptcy and Automatic Stay of the Proceedings" on all plaintiffs' counsel in the NYCAL litigation, which stated: "... in accordance with the automatic stay imposed by section 362 of the Bankruptcy Code, from and after the Petition Date no cause of action arising prior to the Petition Date or relating to the period prior to the Petition Date may be commenced or prosecuted against the Debtors, and no related judgment may be entered or enforced against the Debtors, outside of the Bankruptcy Court without the Bankruptcy Court first issuing an order lifting or modifying the automatic stay" (see Exhibit G and 2)<sup>1</sup>. Because the automatic stay prevented commencement or prosecution of an action against Kaiser, Plaintiff

<sup>1</sup> This notice was served by Lewis Brisbois, Kaiser's counsel in the NYCAL litigation.

commenced this action against various defendants but not against Kaiser which, on August 10, 2018.

On August 9, 2018 the Bankruptcy Court entered an order lifting the automatic stay in place against Asbestos Personal Injury Claimants, effective October 29, 2018, on condition that the claimant or his/her representative execute an "Acknowledgement and Release" form attached to the order providing: (1) that any settlement or judgment... may not be enforced against the assets of the debtor, and (2) that the claimant waives and releases all claims for uninsured amounts...including deductible amounts and punitive damages..."(see Exhibit H). On October 29, 2018 plaintiff's counsel, on behalf of Mr. Seen, filed the "Acknowledgement and Release" form formally lifting the automatic Bankruptcy stay (see Exhibit 10 and I).

Kaiser was brought into this case on April 23, 2019 when IPA Systems, Inc., one of the various defendants in this action, served on it a third-party complaint naming Kaiser as a Third-party defendant. Plaintiff commenced a direct action against Kaiser on July 31, 2019 (see Exhibits 12 and 15).

Kaiser now moves to dismiss this action pursuant to CPLR §3211(a)(5) on the grounds that the statute of limitations has expired. Kaiser argues that since plaintiff was diagnosed with the disease on February 16, 2016, and the statute of limitations to commence a personal injury action is three years, this action against it should've been commenced no later than February 16, 2019. Since plaintiff commenced this direct action against it on July 31, 2019 the action is untimely by five months and should therefore be dismissed. Kaiser argues that plaintiff should have commenced this action as soon as he was diagnosed with the disease and since he did not, Kaiser's bankruptcy filing did not toll the running of the statute of limitations.

Plaintiff opposes the motion arguing that it is meritless. Plaintiff points to CPLR§204(a), which tolls the limitations period while there's a court order in place, and Bankruptcy Code Section 362(a)(1) which creates an automatic stay that prevents the filing of any action against a debtor that has filed a petition in bankruptcy. Plaintiff argues that taking this toll into account there was more than two years remaining in the statute of limitations period when the stay was lifted, and since plaintiff filed the complaint against Kaiser less than one year later, all the causes of action are timely, and Kaiser's motion must be denied.

This court agrees with plaintiff, Kaiser's arguments have no merit. Initially it must be noted that as the party seeking to dismiss under CPLR§ 3211(a)(5), it bears the burden of establishing, prima facie, that the time in which to sue has expired (New York City School Construction Authority v. Ennead Architects, LLP, 148 A.D.3d 618, 49 N.Y.S.3d 462 [1<sup>st</sup>. Dept. 2017]; Benn v. Benn, 82 A.D.3d 548, 918 N.Y.S.2d 465 [1<sup>st</sup>. Dept. 2011]). Defendant has failed to meet this burden.

CPLR§ 214(5) states that "...an action for personal injury is to be commenced within three years...except as provided in sections 214-b, 214-c and 215."

CPLR§ 214-c states that "(2)...notwithstanding the provisions of section 214, the three year period within which an action 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 upon 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 should have been discovered by the plaintiff whichever is earlier."

Plaintiff was exposed to asbestos-containing products from the 1960s through the 1980s but discovered the latent effects of exposure to this substance on February 16, 2016; therefore, the three-year period within which to commence an action for his personal injury commenced on that date and expired on February 16, 2019.

CPLR§ 204(a) states: “where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.”

Plaintiff argues that the Bankruptcy Court’s order and the automatic stay provisions in section 362 of the Bankruptcy Code made it impossible for him to assert a claim against Kaiser.

Section 362 (a)(1) of the Bankruptcy Code states: “ Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title... operates as a stay, applicable to all entities of...the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.”

“Where a statute of limitations had not run against causes of action against a debtor corporation for personal injuries when a petition for reorganization of the corporation was filed, the statute of limitations [is] tolled until the reorganization proceeding is concluded”(Lehman v. Cameron, 207 Misc.919 [Sup. Ct. N.Y. 1955]).

At the time Kaiser filed for bankruptcy on September 30, 2016 there was still two years and five months remaining on the limitations period. The limitations period was subsequently stayed by the Bankruptcy Court’s order served on all NYCAL plaintiffs’ counsel on October 3, 2016 and by the automatic stay provisions of Section 362(a)(1) of the Bankruptcy Code. Since the statute of limitations had not yet run against plaintiff’s personal injury causes of action against Kaiser, the statute of limitations was tolled.

The automatic stay was lifted on October 29, 2018. At that time plaintiff had two years and five months remaining on the statute to commence an action against Kaiser. Plaintiff commenced this action less than a year after the lifting of the stay, therefore this action is timely. Defendant Kaiser has failed to carry its burden of demonstrating that the time in which plaintiff may commenced this action to recover for his personal injuries has expired.

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

Accordingly, it is ORDERED that defendant Kaiser Gypsum Company's motion to dismiss pursuant to CPLR §3211(a)(5) is denied.

ENTER:

November 8, 2019

MANUEL J. MENDEZ  
J.S.C.

  
MANUEL J. MENDEZ

J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST     REFERENCE