STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 7, 2019)

IN RE: DAVOL/C.R. BARD HERNIA MESH MULTI-CASE MANAGEMENT	:	**Coordination No. 2017-02**
REGINA RECINE, *Plaintiff,*	:	
v.	:	**C.A. No. PC–2017–3275**
DAVOL INC. and C. R. BARD INC., *Defendants.*	:	

DECISION

GIBNEY, P.J. Davol Inc. (Davol) and C. R. Bard Inc. (Bard) (collectively Defendants) move to dismiss the Amended Complaint of Regina Recine (Plaintiff or Recine) arguing Plaintiff's claims are barred by the applicable statute of limitations. Plaintiff objects to the motion. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

On May 12, 2008, Plaintiff underwent surgery to repair a ventral hernia and was implanted with a Ventralex™ Hernia Patch (Ventralex Patch), a medical device designed, manufactured, and distributed by Defendants. On October 4, 2011, Plaintiff underwent an additional surgery to remove a portion of the Ventralex Patch. In July 2015, Plaintiff learned she needed a third surgery to remove another portion of the Ventralex Patch.

On July 13, 2017, Plaintiff filed a Complaint alleging she was severely and permanently injured as a result of the defective nature of the Ventralex Patch. Plaintiff referenced the May

2008 and October 2011 surgeries in the Complaint, but did not include the July 2015 allegations. Defendants moved to dismiss the Complaint on August 7, 2017 on the grounds that the action is barred by G.L. 1956 § 9-1-14(b), which sets forth a three-year statute of limitations for personal injury actions, including those arising under theories of products liability. Defendants argued that at a minimum, Plaintiff became aware of her injuries and their potential relationship to the Ventralex Patch when a portion of the device was removed from Plaintiff's body in October 2011, and therefore argued Plaintiff's claims are time-barred.

Plaintiff filed an Amended Complaint on August 11, 2017, this time including the July 2015 allegations. Furthermore, Plaintiff alleged that she did not learn of the Defendants' "wrongdoing in connection with the design, manufacture, and marketing of the Ventralex product until the end of 2016." (Pl.'s Am. Compl. ¶ 42.) Plaintiff attached an affidavit to the Amended Complaint, stating that "[p]rior to July 2015, [she] was never informed . . . about the defective nature of [the Ventralex Patch]" (Pl.'s Aff. ¶ 8) and that "[p]rior to the end of 2016, [she] was never informed . . . about Bard and Davol's wrongdoing in connection with the defective mesh . . ." (Pl.'s Aff. ¶ 9). Plaintiff argued that the Amended Complaint rendered Defendants' motion to dismiss moot, and further asserted that the claims in the Amended Complaint survive under both Rhode Island's "discovery rule" and § 9–1–20, Time of accrual of concealed cause of action.

On August 22, 2017, Defendants moved to dismiss Plaintiff's Amended Complaint, again asserting the claims therein are time-barred. Defendants contended Plaintiff's allegations in the Amended Complaint—including her assertion that she learned she needed additional surgery in July 2015, along with the allegation that she was not aware of Defendants' wrongdoing until the end of 2016—are insufficient to trigger the application of the discovery rule. Defendants further

asserted that Plaintiff failed to properly establish the elements of fraudulent concealment, which require both an actual misrepresentation and the concealment of a potential cause of action. Plaintiff objected to Defendants' second motion to dismiss on similar grounds as those set forth in her initial objection.

II

Standard of Review

It is well-settled that the sole function of a motion to dismiss is to test the sufficiency of the complaint. *Ryan v. State, Dep't of Transp.*, 420 A.2d 841, 842 (R.I. 1980); *Dutson v. Nationwide Mut. Ins. Co.*, 119 R.I. 801, 803-04, 383 A.2d 597, 599 (1978). "[A]lthough the statute of limitations is designated as an affirmative defense in Super. R. Civ. P. 8(c) . . . modern practice permits it to be raised by a motion to dismiss under Super. R. Civ. P. 12(b)(6) where . . . the defect appears on the face of the complaint." *Young v. Park*, 116 R.I. 568, 573, 359 A.2d 697, 700 (1976) (citing *Tasby v. Peek*, 396 F. Supp. 952 (W.D. Ark. 1975)). '"When ruling on a Rule 12(b)(6) motion, the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor."' *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000) (quoting *R.I. Affiliate, Am. Civ. Liberties Union, Inc. v. Bernasconi*, 557 A.2d 1232 (R.I. 1989)). "A motion to dismiss under Rule 12(b)(6) will only be granted 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Bruno v. Criterion Holdings, Inc.*, 736 A.2d 99 (R.I. 1999) (quoting *Folan v. State/DCYF*, 723 A.2d 287, 289 (R.I. 1999)).

III

Analysis

Plaintiff attached a personal affidavit to the Amended Complaint reiterating the allegations therein. In general, "[a] trial justice [is] not obligated to consider the affidavits offered by the parties in ruling on . . . [a] Rule 12(b)(6) motion." *Bethlehem Rebar Indus., Inc. v. Fid. & Deposit Co. of Maryland*, 582 A.2d 442, 444 (R.I. 1990); *see also Martin v. Howard*, 784 A.2d 291, 298 (R.I. 2001) ("when the motion justice receives evidentiary matters outside the complaint and does not expressly exclude them in passing on the motion, then Rule 12(b)(6) specifically requires the motion to be considered as one for summary judgment"). However, when a document is attached to the complaint itself, a trial justice may properly consider and reference said document in deciding a motion to dismiss. Super. R. Civ. P. 10(c); *Bowen Ct. Assocs. v. Ernst & Young, LLP*, 818 A.2d 721, 725 (R.I. 2003) ("[i]t is certainly true that documents attached to a complaint will be deemed incorporated therein by reference"). Here, as Plaintiff attached the affidavit to the Amended Complaint, the Court deems it incorporated into the Amended Complaint by reference and shall consider it in this Decision. *Id.* at 725-26 (explaining that "a motion justice may properly consider and refer to such documents in deciding a Rule 12(b)(6) motion" without converting the motion to one for summary judgment).

A

Discovery Rule

Plaintiff argues that this action is timely under § 9-1-14, as claims in the Amended Complaint survive under the discovery rule. In general, "[a]ctions for injuries to the person shall be commenced . . . within three (3) years . . . after the cause of action shall accrue." Sec. 9-1-14(b); *see also Pirri v. Toledo Scale Corp.*, 619 A.2d 429, 430-31 (R.I. 1993) (holding that § 9-

1-14 applies to claims arising under both negligence and products liability). However, Rhode Island recognizes a discovery rule that replaces the time of injury with the time "an injury or some wrongful conduct should have, in the exercise of reasonable diligence, been discovered." *Renaud v. Sigma-Aldrich Corp.*, 662 A.2d 711, 715 (R.I. 1995) (citing *Anthony v. Abbott Labs.*, 490 A.2d 43 (R.I. 1985)). The Supreme Court has held that

> "where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer." *Anthony*, 490 A.2d at 46.

It is well-settled that courts must apply the discovery rule narrowly. *Benner v. J.H. Lynch & Sons, Inc.*, 641 A.2d 332, 337 (R.I. 1994) (explaining that trial judges "must be mindful not to interpret [the discovery rule] to extend far beyond the facts on which it was based"). Ultimately, courts must be cautious not "to blur or dilute the logical principles underlying a statute of limitations" in their application of the discovery rule. *Anthony*, 490 A.2d at 50. At the same time, the Supreme Court has recognized the importance of the discovery rule when a patient does not learn of the wrongdoing that caused his or her injury, despite the exercise of reasonable diligence. *See Zuccolo v. Blazar*, 694 A.2d 717, 719 (R.I. 1997) (holding that plaintiff's earlier suspicion of a causal connection between a prescription medication and the plaintiff's joint disease did not constitute discovery until the plaintiff's suspicions were confirmed by his physicians).

Here, Plaintiff maintains she did not learn the Ventralex Patch was defective until July 2015, and did not learn the defect was related to 'wrongdoing' by Defendants until the end of 2016. Plaintiff therefore seeks to apply the discovery rule to toll the statute of limitations until several years after her first and second hernia surgeries. As persuasive precedent, Plaintiff cites

three Superior Court cases involving allegedly defective hernia devices designed and manufactured by Defendants in which this Court applied the discovery rule to toll the statute of limitations.[1] *See Impulse Packaging, Inc. v. Sicajan*, 869 A.2d 593, 602 n.14 (R.I. 2005) ("lower court decisions are neither binding on this Court, nor do they establish precedent").

In response, Defendants argue that Plaintiff's allegations are insufficient to toll the statute of limitations. Defendants characterize both the Amended Complaint and the affidavit as "conclusory," and argue Plaintiff knew or should have known at the time of her first hernia explant surgery in October 2011, of the possible relationship between her injury and the Ventralex Patch. Therefore, Defendants maintain that the statute of limitations began to run in 2011 and expired in 2014, approximately three years before Plaintiff filed her Complaint.

On a motion to dismiss, this Court must accept Plaintiff's allegations to be true, and view these facts in the light most favorable to the Plaintiff. *Estate of Sherman*, 747 A.2d at 473. Applying this standard, this Court finds that Plaintiff has sufficiently alleged that the manifestation of her injury, the cause of that injury, and her knowledge of the Defendants' wrongdoing occurred at different points in time. *Anthony*, 490 A.2d at 46; *see also Zuccolo*, 694 A.2d at 719 (holding that the discovery rule was applicable when the plaintiff "had only suspected a connection [between his injury and the potential wrongdoing of the defendants], but that suspicion had never been confirmed by . . . the diagnoses given by [] numerous experts").

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[1] *Shearier v. Davol Inc.,* No. PC/07-2639, 2007 WL 441139 (R.I. Super. Nov. 9, 2007) (finding, on a motion to dismiss, that the statute of limitations did not begin to accrue until an FDA recall of the hernia device at issue, several years after plaintiff's physicians explanted the device); *Blouin v. Surgical Sense, Inc.*, No. PC 07-6855, 2008 WL 2227781, at *3 (R.I. Super. May 12, 2008) (applying the discovery rule on a motion to dismiss to toll the statute of limitations until the defendants informed the FDA and the public of the defective nature of the product); *Stradtner v. Davol Inc.*, No. PC/07-1708, 2007 WL 4471138 (R.I. Super. Nov. 9, 2007) (finding, on a motion for summary judgment, that a genuine issue of fact existed with respect to the applicability of the discovery rule).

The Court cannot say that there are no conceivable facts under which the discovery rule could be properly applied to the allegations herein. *Bruno*, 736 A.2d at 99 ("A motion to dismiss . . . will only be granted 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim'").

B

Fraudulent Concealment

Plaintiff further seeks to toll the statute of limitations under the doctrine of fraudulent concealment. Under this principle, set forth in § 9–1–20, "if a potential defendant fraudulently conceals a cause of action from a potential plaintiff, the statute of limitations is tolled until such time as the plaintiff discovers the existence of a cause of action." *Ryan v. Roman Cath. Bishop of Providence*, 941 A.2d 174, 182 (R.I. 2008). A plaintiff must demonstrate "(1) that the defendant made an actual misrepresentation of fact; and (2) that, in making such misrepresentation, the defendant fraudulently concealed the existence of plaintiff's causes of action." *Id.* It is not enough to allege that a defendant committed fraud; rather, a plaintiff must show that the defendant "attempted by fraud or misrepresentation to conceal the existence of the cause of action." *Renaud*, 662 A.2d at 714.

Here, Plaintiff alleges Defendants fraudulently concealed information regarding the defective nature of the Ventralex Patch, thereby preventing Plaintiff from discovering the potential product defect within the three-year statute of limitations. In the Amended Complaint, Plaintiff alleges that, *inter alia,* "Defendants were . . . aware of the defects in the manufacture and design of Ventralex and chose . . . not to issue a recall" (Pl.'s Am. Compl. ¶ 25); "Defendants manipulated, altered, skewed, slanted, misrepresented, and/or falsified pre-clinical

and/or clinical studies to bolster the perceived performance of Ventralex" (Pl.'s Am. Compl. ¶ 26); and, "Defendants provided incomplete, insufficient, and misleading information to physicians in order to increase the number of physicians using Ventralex for the purpose of increasing their sales." (Pl.'s Am. Compl. ¶ 33.) Plaintiff argues that this "dissemination of inadequate . . . information" (*Id.* at ¶ 33) prevented her from learning of the potentially defective nature of the Ventralex Patch within the three-year statute of limitations.

Plaintiff has sufficiently pled fraudulent concealment in order to survive Defendants' motion to dismiss. *Bruno*, 736 A.2d at 99 ("[i]n reviewing a motion to dismiss under Rule 12(b)(6), [the court will] accept the allegations of the plaintiff's complaint as true and view them in the light most favorable to the plaintiff") (citing *Folan*, 723 A.2d at 289). In both the Amended Complaint and the affidavit, Plaintiff has set forth specific examples of fraud in support of the claim that Defendants concealed Plaintiff's potential cause of action against them. *Renaud*, 662 A.2d at 714 ("[i]n order to toll the running of the statute of limitations . . . , there would have to be a showing that . . . the party asserting the statute-of-limitations defense, attempted by fraud or misrepresentation to conceal the existence of the cause of action"). Assuming Plaintiff's allegations to be true, the statute of limitations should be tolled under § 9–1–20. *See McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005) ("it is our function to examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts").

IV

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is denied. Viewing the Amended Complaint and the attached affidavit in the light most favorable to the Plaintiff, the Court finds that the Plaintiff's claims are not herein barred by the statute of limitations.

Prevailing counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Regina Recine v. Davol Inc. and C. R. Bard Inc.
CASE NO:	PC-2017-3275
COURT:	Providence Superior Court
DATE DECISION FILED:	January 7, 2018
JUSTICE/MAGISTRATE:	Gibney, P.J.

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