

Baldi v Rocky Point Union Free Sch. Dist.
2022 NY Slip Op 30891(U)
March 17, 2022
Supreme Court, New York County
Docket Number: Index No. 157460/2021
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 13

Justice

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INDEX NO. 157460/2021
DOMINIC BALDI MOTION DATE 08/09/2021
Plaintiff, MOTION SEQ. NO. 001

- v -

ROCKY POINT UNION FREE SCHOOL DISTRICT,
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for MISC. SPECIAL PROCEEDINGS

Upon the foregoing documents, it is hereby ordered that Plaintiff's order to show cause seeking leave to serve a late notice of claim is granted for the reasons set forth below.

Here, Plaintiff was diagnosed with lung cancer on or about November 6, 2019. Plaintiff was an electrician who worked in public schools and was exposed to asbestos during the course of his employment. Plaintiff commenced an action for personal injuries based upon his exposure to asbestos on August 20, 2020 by summons and verified complaint under index no. 190217/2020. Prior to the commencement of such action, Plaintiff made two attempts to retain law firms specializing in asbestos exposure claims. While Plaintiff's first two attempts to retain legal counsel were unsuccessful, Plaintiff retained his current counsel on March 26, 2020. A mere three weeks later, Plaintiff filed the Notice of Claim on April 10, 2020, putting Rocky Point Union Free School District (hereinafter referred to as Rocky Point) on notice of the instant matter. Subsequently, Plaintiff filed the instant order to show cause on August 09, 2021 to serve a late Notice of Claim upon Rocky Point.

Rocky Point relies upon CPLR 214(c)(2), arguing that “[t]he period within which an action to recover damages for personal injury caused by the latent effects of exposure to any substance or combination of substances 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.” *See* Affirmation In Opposition To Petition To File A Late Notice Of Claim, p. 6, ¶ 20. Further, Rocky Point contends that “the Court of Appeals. . . rejected the notion that the statute does not begin to run until the plaintiff identifies the precise etiological source of the injury; it is enough to discover that the ‘plaintiff’s symptoms were attributable to an injury inflicted by an outside force.’” *Id* at p. 8, ¶ 23.

According to Plaintiff, the accrual date was in fact “November 6, 2019, when he was diagnosed with lung cancer.” *See* Affirmation In Reply To Respondent’s Opposition To Petition To File A Late Notice Of Claim, p. 3, ¶ 12. Further, Plaintiff contends that the Notice of Claim should be deemed timely, as the executive orders due to the COVID-19 pandemic tolled the one year and ninety-day period to file a Notice of Claim.

Defendants rely upon *Wetherill v Eli Lilly & Co.*, 89 NY2d 506, 513 (1997), where the Court of Appeals held that “for all intents and purposes, discovery that a plaintiff’s symptoms were attributable to an injury inflicted by an outside force is the same as ‘discovery of the cause of the injury’ within the meaning of CPLR 214–c(4)”. The plaintiff in *Wetherill* first learned in 1988 that her reproductive injuries could have been caused by her mother consuming a harmful drug, diethylstilbestrol (DES). However, such plaintiff relied upon the 1989 date in which she overheard her treating physician state that she had classic symptoms of DES, as the date her

claim accrued. The Court of Appeals rejected that notion, and instead relied upon the date in which the discovery of the cause of injury could have been linked to the illness itself.

Here, defendants' heavy reliance upon the *Wetherill* case fails. Preliminarily, the Court notes that the Court of Appeals in *Wetherill* did not hold that the plaintiff's claim began to accrue at the manifestation of the first symptom, as such first symptom, i.e. a miscarriage, occurred in 1980. Rather, the *Wetherill* court held that the plaintiff's cause of action accrued in 1988, eight years after the plaintiff's first symptom, when the plaintiff first obtained knowledge that her reproductive symptoms could be linked to her own mother's usage of DES. Similarly, Plaintiff Baldi's claim did not begin to accrue on the date of his first symptoms in 2017. As in *Wetherill*, Plaintiff Baldi's claim accrued when he obtained some knowledge of "the primary conditions that form the basis of Plaintiff's claim". *Id.* at 514. In the instant case, the discovery of the cause of injury occurred at the time of diagnosis. The time at which the statute was intended to start the clock is when plaintiff can ascertain the cause of the injury, and not just a display of the symptoms. As with Baldi's injuries, "[t]o expect Dominic Baldi to forge ahead and commence suit on such an amorphous set of symptoms would be tomfoolery and not at all what the statute was intended for." *See* Affirmation in Reply To Respondent's Opposition To Petition To File a Late Notice of Claim, p. 8, ¶ 23.

Plaintiff also contends that leave to file the late Notice of Claim should be granted as "the Statutes of limitations were 'tolled' in New York by Executive Order No. 202.8, issued by Governor Andrew M. Cuomo on March 20, 2020, in response to the COVID-19 pandemic." Affirmation In Reply To Respondent's Opposition To Petition To File A Late Notice Of Claim, p.13, ¶ 31. Furthermore, "[o]ver the next six and a half months, that toll was renewed by further executive orders every 30 days until, on October 4, 2020. . . the tolling order would be extended

for only one more 30 day period ‘until November 3, 2020’”. *Id.* at p.13-14, ¶ 32. In this case, Plaintiff’s cause of action began to accrue when Plaintiff was diagnosed with lung cancer, which was November 6, 2019. As the statute of limitations was tolled due to Governor Cuomo’s Executive Orders, Plaintiffs notice of claim filed on April 10, 2020 is deemed timely. Further, “[o]ne factor the court must consider is ‘whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.’” *Matter of Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 461 (2016). Here, Plaintiff attempted to seek counsel and was unable to retain legal counsel until March 26, 2020, at which time the world was greatly affected by the COVID-19 pandemic. Defendant fails to even allege prejudice. Thus, Plaintiff’s order to show cause is granted.

Accordingly, it is

ORDERED that Plaintiff’s Order to show cause is granted and the Notice of Claim filed on April 10th, 2020 is hereby deemed timely served; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.

3/17/2022
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE