[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 112324/2006

YAPALATER, GREG A.

INDEX NO. _____

vs

BREATH APPEAL LLC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

...lowing papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

Court discloses consulting with Dr. Yapalater as a pediatrician in or about 1990.

Dated: 7/3/07

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

...ACTION/SPECIAL PROCEEDING REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

----------X

GREG A. YAPALTER and KARIN YAPALTER,

Plaintiffs,

-against-

INDEX NO. 112324/06

BREATH APPEAL, L.L.C.,

Defendant.

----------X

EMILY JANE GOODMAN, J.S.C.:

Defendant Breath Appeal, L.L.C. (Breath Appeal) moves to dismiss this personal injury action, pursuant to CPLR 214 and 214-c, on the basis of untimeliness.

Plaintiff Greg A. Yapalter (Yapalter) alleges that, from 1999 through on or about October 24, 2003, he purchased and used a mouthwash/breath freshener, Breath Appeal, which was made by defendants. According to Yapalter, in September 2003, he went to see his dentist, Dr. Burney Croll, after a five-year hiatus, for routine prophylactic work. He alleges that when he returned to Dr. Croll's office for a treatment, he complained of tooth sensitivity. Yapalter states that on October 24, 2003, he again visited his dentist's office and saw Dr. Croll, himself, who indicated that he had a significant loss of dental enamel, and asked Yapalter whether he had frequently used lemon juice or raw lemons over any long period. Yapalter said he had not, but indicated that he used a breath freshener. When he returned home, Yapalter examined the ingredients on the bottle of Breath Appeal and found that citric acid was one of the ingredients.

According to Yapalter, Dr. Croll advised him to immediately stop using the product, which he did.

Yapalter submits the affidavit of Dr. Croll, who states that on September 26, 2003, Yapalter had routine dental profylaxis, performed by a dental hygienist at his office, and that on October 3, 2003, Yapalter returned to the office for a whitening treatment, and reported tooth sensitivity. At that time, according to Dr. Croll, an associate dentist, Dr. Michael Gulizio, administered local anesthesia for the treatment.

Dr. Croll, further states that Yapalter returned to his office on October 24, 2003, reporting residual pain from the bleaching procedure. Dr. Croll examined Yapalter, and diagnosed a loss of a significant volume of dental enamel since he had last examined Yapalter, five years earlier. Dr. Croll states that Yapalter would not have been able to identify the loss of enamel merely when he was performing his dental hygiene, or when he looked in the mirror. According to Dr. Croll, the loss of enamel was consistent with prolonged exposure to citric acid.

Defendant contends that the three-year statute of limitations under both CPLR 214 and 214-c had run by the time Yapalter filed his case on September 5, 2006.

Pursuant to CPLR 214-c, which applies to injuries resulting from the latent effects of exposure to substances, the three-year period during which a lawsuit 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." CPLR 214-c (2).

Defendant argues that because Yapalter typically bought a three-months' supply of Breath Appeal, and his last purchase was April 15, 2003, that his last usage of the product would have been on July 15, 2003, more than three years from the time his lawsuit was filed. Defendant contends that Yapalter calculates his last usage of Breath Appeal based on when his last usage of the product "would have been anticipated," but never actually states when he last used the product. *See* Affirmation of Thomas M. Mullaney, dated February 6, 2007, ¶ 7. Defendant appears to have overlooked Yapalter's statements that his last order for Breath Appeal, made on April 15, 2003, was for a five month supply (*see* Affidavit of Greg A. Yapalter, M.D., dated Jan. 30, 2007, at 2) and that he had used the Breath Appeal product up until he was advised by Dr. Croll of the dissolution of his tooth enamel "sometime in October of 2003." *Id.*

Morever, CPLR 214-c was enacted by the Legislature in 1986 to expand the statute of limitation for actions where personal injury results from the latent effects of a substance. The purpose of the legislation was to "ameliorate 'a fundamental injustice in the laws of our State' resulting from the 'archaic'

rule that measured the statute of limitations from the date of exposure, regardless of the time when injury became manifest." 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 214-c.01 (citation omitted). Therefore, when Yapalter last used Breath Appeal is not the determinative factor in establishing the statute of limitations. Rather, the question turns on when Yapalter discovered, or should have discovered, the injury allegedly caused by his use of the breath freshener. According to Yapalter's allegations, he first experienced tooth sensitivity when he went to his dentist for tooth-whitening, which, according to the affidavit of Dr. Croll, occurred on October 3, 2003. Then, on October 24, 2003, Dr. Croll diagnosed the loss of tooth enamel. "Discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, 'the injured party discovers the primary condition on which the claim is based.'" *MRI Broadway Rental, Inc. v US Min. Prdts. Co.*, 92 NY2d 421, 429 [1998]), citing, *Matter of New York County DES Litigation v Eli Lilly & Co.*, 89 NY2d 506, 514 [1997]). Thus, unless defendant can show that Yapalter discovered the condition at an earlier date, the statute of limitations began to run on October 3, 2003, when Yapalter experienced tooth sensitivity, or on October 24, 2003, when Dr. Croll diagnosed the loss of tooth enamel. Utilizing even the earlier date, Yapalter's September 5, 2006, filing was timely.

Defendant argues that, particularly given that Yapalter is a physician, it is unreasonable that he had not visited his dentist for five years; therefore, according to defendant, with reasonable diligence he should have discover his injury before October 2003. Defendant bases its argument solely on the assertion of its attorney, however, and not on any evidence, expert or otherwise, that Yapalter should have gone to the dentist sooner, and should have discovered the alleged injury sooner. Particularly on a motion to dismiss, where the material allegations must be deemed true and all inferences that flow from those allegations must be resolved in favor of the pleader (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), this court cannot find, as a matter of law, that Yapalter failed to exercise reasonable diligence by not visiting his dentist more frequently.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied.

This Constitutes the Decision and Order of the Court.

Dated: July 5, 2007

ENTER:

J.S.C.
EMILY JANE GOODMAN