

Bowes v Healy

2009 NY Slip Op 31119(U)

March 31, 2009

Supreme Court, New York County

Docket Number: 9944/03

Judge: F. Dana Winslow

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

CRAIG BOWES and ELIZABETH FEUDALE,

Plaintiffs,

-against-

MOTION SEQ. NO.: 009
MOTION DATE: 1/21/09

DORIS HEALY,

INDEX NO.:9944/03

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....	1
Affirmation in Opposition.....	2
Memorandum of Law.....	3
Reply Affirmation.....	4

Motion by defendant for partial summary judgment pursuant to CPLR 3212, dismissing the personal injury cause of action as time-barred, is **granted**.

In 2005, defendant brought an untimely motion for judgment dismissing the complaint pursuant to CPLR 3211(a)(5). This Court converted the motion to one for summary judgment and granted the motion. On appeal, the Appellate Division reversed on the grounds that this Court erred when it failed to grant the proper notice required for a dispositive dismissal under CPLR 3212. At this time, four years later, defendant moves for summary judgment pursuant to CPLR 3212 on the same grounds.

Summary judgment is the procedural equivalent of a trial [*Capelin Assoc., Inc v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The function of the court in

deciding a motion for summary judgment is to determine if triable issues of fact exist [*Matter of Suffolk Cty Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 (1994)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [*Zuckerman*].

Defendant submits the videoconference transcript of plaintiff Elizabeth Feudal, now Bows, to establish that Mrs. Bows has been on disability and not worked outside the home since 1990 or 1991 (E. Bows transcript dated 3/4/05, at pp. 11, 21). She was first treated for interstitial cystitis (Id. at 21-22), stomach problems (Id. at 46), vaginal itching and pain (Id. at 46-47), and irritable bowel syndrome and gastric reflux disease (Id. at 48) in 1989. Mrs. Bows also testified that she developed bilateral tenets in 1990, 1991, or 1992 (E. Bows transcript dated 7/19/05, at p. 153), decreased libido and poor memory in 1990 (Id. at 154), fibromyalgia in 1993 or 1994 (Id.), chronic fatigue syndrome in the early 90's (Id. at p. 155), and multiple chemical sensitivity "probably early 90s" (Id. at 156). Mrs. Bows testified that she believes all of her symptoms were related to mold (Id. at 157).

The statute of limitations for a personal injury claim is three years (CPLR 214(5)). Accrual of the claim under CPLR 214(5) commences on the date plaintiff was first injured [*Snyder v Town Insulation, Inc.*, 81 NY2d 429, 433(1993)].

Application of this rule of law to Mrs. Bows' alleged injuries, compels the conclusion that Mrs. Bows' personal injury claims accrued anywhere from 1989 through the early 90's. Yet this action was not filed until 2003. Under these circumstances, defendant has presented a *prima facie* case that the personal injury claims are time-barred.

Plaintiffs' first objection is that "this issue has already been ruled upon both by the Appellate Division and by this Honorable Court, and the issue has been decided both as *res judicata* and law of the case"(Winn affirmation in opposition, par. 2). However, a judgment reversed on appeal has no issue preclusion effect [*State v Moore*, 298 AD2d 814 (3rd Dept. 2002)], and the law of the case doctrine is not applicable where a summary judgment motion follows a motion to dismiss [*Bernard v Grenci*, 48 AD3d 722 (2nd Dept. 2008); *Riddick v City of New York*, 4 AD3d 242 (1st Dept. 2004)]. Furthermore, a reversal of summary judgment based upon lack of proper notice is not a determination on the merits, as required for preclusion [see generally *Josey v Goord*, 9 NY3d 386 (2007)].

For the record, the Appellate Division did not find that a triable issue of fact exists sufficient to preclude summary judgment. It determined that the defendant's 3211 dismissal motion was not one which exclusively involved a purely legal question.

Nor does Judge McCabe's determination dated May 21, 2008, allowing renewal of plaintiffs' motion to vacate dismissal of this action, and upon renewal vacating the prior dismissal of the entire action, preclude this Court from considering the limitations issue presented on this properly noticed motion for partial summary judgment.

Plaintiffs' attorney now concedes that the applicable statute of limitations is

CPLR 214(5)(personal injury generally), rather than CPLR 214-c (personal injury caused by latent effects of exposure to any substance), because Mrs. Bows' injuries are "patent, not latent" (Winn affirmation in opposition, par. 8). With this argument plaintiffs seek to sidestep the New York cases finding no "continuing tort" exception to the comprehensive rules in CPLR 214-c for exposure to toxic substances [see *Jensen v General Elec. Co.*, 82 NY2d 77 (1993); *Annunziato v City of New York*, 224 AD2d 31, 40 (2nd Dept. 1996); see also *Syms v Olin*, 408 F3d 95, 109 (2nd Cir. 2005)].

Plaintiffs seek to bring their exposure case within the doctrine of "continuing tort," wherein the cause of action accrues anew each day. Plaintiffs cite *509 Sixth Ave. Corp v New York City Tr. Auth.*, [15 NY2d 48 (1964)] and *Lichter v 349 Amsterdam Ave. Corp.*, [8 AD3d 212 (1st Dept.), lv app dsmd 3 NY3d 738 (2004)] for their "continuing tort" theory. However, these cases are inapposite as they involve "continuous trespass" and nuisance, respectively. On this record, plaintiffs have submitted no authority or legal precedent for the application of their theory of a "continuing tort" to the facts of this case, and consequently this theory must be rejected.

Finally, plaintiffs argue in the alternative, that the personal injury claims are governed by CPLR 214-c(4), and they informally and belatedly request leave to amend their complaint to allege a cause of action pursuant to CPLR 214-c(4). The basis for this request is a brief three-paragraph affidavit from Dr. Rhea, who claims that in 2003 he diagnosed Mrs. Bows with "toxic encephalopathy, immune deregulation, autonomic nervous system dysfunction, and chemical sensitivity" (Rhea affidavit, par. 2). Not one of these injuries is alleged in plaintiffs' verified bill of particulars, dated January 6, 2004 (Exhibit J to defendant's moving papers),

although Mrs. Bows did testify that her chemical sensitivity commenced "probably early 90s."

Suffice it to say that the self-serving and conclusory Rhea affidavit fails to raise a triable issue of fact as to the state of scientific or medical knowledge regarding Mrs. Bows' symptoms in the mid 1990s. In addition, while leave to amend should be freely given [CPLR 3025(b)], where the proposed amendment is palpably insufficient or devoid of merit, the amendment is properly **denied** [*Tornheim v Blue & White Food Products Corp.*, 56 AD3d 761 (2nd Dept. 2008); *Zeleznik v MSI Construction, Inc.*, 50 AD3d 1024 (2nd Dept. 2008)]. Here, the proposed amendment to the complaint must be **denied** as palpably insufficient because plaintiffs failed to aver facts demonstrating the applicability of the tolling provisions of CPLR 214-c(4) [*Bass v Union Carbide Corp.*, 22 AD3d 618 (2nd Dept. 2005)].

Based on the foregoing, the defendant is entitled to partial summary judgment dismissing the personal injury claim alleged in this action as time-barred.

This constitutes the Order of the Court.

Dated: 3/31/09

ENTER:

[Handwritten Signature]
J.S.C.

ENTERED
MAY 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE