

<b>DiMaria v A.C.&amp;S., Inc.</b>
2011 NY Slip Op 33015(U)
November 16, 2011
Sup Ct, NY County
Docket Number: 123971/94
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

JOAN DIMANA

- v -

A. C. vs INC

INDEX NO. 123971/94  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

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

As per the memo decision  
of 11.16.11.

**FILED**

NOV 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11.16.11

HON. SHERRY KLEIN HEITLER <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X  
JOAN DIMARIA, as Personal Representative for the  
Estate of JEROME DIMARIA, and JOAN DIMARIA,  
Individually,

Index No.: 123971/94  
Motion Seq. 001

Plaintiffs,

**DECISION AND ORDER**

-against-

A.C. & S., Inc., et al.,

Defendants.

**FILED**

**NOV 17 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

----- X  
**SHERRY KLEIN HEITLER, J.:**

Defendant Kohler Co. ("Kohler") moves pursuant to CPLR 3211(a)(5) to dismiss plaintiffs' amended complaint by reason of the movant having been added as a defendant following the expiration of the statute of limitations. For the reasons set forth below, defendant's motion is granted in part and denied in part.

The undisputed facts are: Plaintiffs' decedent Jerome DiMaria was diagnosed with asbestosis in or about February of 1994. He filed a lawsuit to recover for personal injuries arising from this condition in August of 1994. Kohler was not named as a defendant in that complaint. On December 23, 2008, more than fourteen years later, Mr. DiMaria was diagnosed with lung cancer. He passed away shortly thereafter on March 21, 2009. On July 12, 2011, plaintiffs filed an amended complaint alleging new causes of action for personal injuries and for wrongful death, both as against the defendants named in the original complaint, and against Kohler, and others, as new defendants.

On this motion, Kohler argues that plaintiffs were statutorily time barred from amending the original complaint to add it as a defendant because the applicable statute of limitations, namely

CPLR 214-c, had long since run. Kohler submits that insofar as plaintiffs are time-barred from suing for personal injuries, the decedent's estate is also time-barred from suing for wrongful death. Plaintiffs concede that their wrongful death claims are time-barred. They argue, however, that their personal injury claims are governed by a different limitations period, and are therefore duly pled.

In general, personal injury actions are materially different from wrongful death claims. In *Heslin v County of Greene*, 14 NY3d 67, 77 (2010), the Court of Appeals clarified that "the two causes of action are predicated on essentially different theories of loss which accrue to different parties." In this context, personal injury actions are brought to recover for a decedent's conscious pain and suffering prior to his death. Wrongful death claims, on the other hand, are designed to compensate a decedent's distributees who have suffered pecuniary injury as a result of the wrongful act which caused the decedent's death. See *Lancaster v 46 NYL Partners*, 228 A.D.2d 133, 138 (1st Dept 1996); see also *Young v Bonilla*, 2006 NY Slip Op 50638U, 11 Misc. 3d 10181A, at \*2 (Sup. Ct. NY Cty 2006). Personal injury claims accrue to a decedent's estate, whereas wrongful death claims may only be brought on behalf of the decedent's distributees. See EPTL §§ 5-4.1, 11-3.2(b). Given these stark differences, it is not surprising that each cause of action is governed by a different statute of limitations.

CPLR 214-c sets forth a three year statute of limitations for personal injuries arising from the latent effects of exposure to toxic substances, including asbestos. This period begins to run from the "date of discovery of the injury by 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). Wrongful death claims are governed by EPTL § 5-4.1, which provides that such claims must be commenced within two years after the decedent's death.

In terms of plaintiffs' wrongful death claim, Mr. DiMaria passed away on March 21, 2009

and the amended complaint was not filed until July 12, 2011, more than two years later. As plaintiffs concede, the wrongful death claims herein plainly are time-barred and to this extent, defendant's motion is granted. EPTL § 5-4.1

The only dispute is whether Mr. DiMaria's personal injury claims are actionable. In this regard, Kohler argues that such claims are time-barred as to it because it was added to this lawsuit as a defendant almost seventeen years after the original complaint was filed. Kohler also argues, in the alternative, that Mr. DiMaria's ability to sue for his personal injury claims expired upon his death.

It is established that a party's lung cancer constitutes a "separate and distinct" injury from his asbestosis so as to trigger New York's "second injury rule", to wit: "[M]anifestations of injuries in toxic tort cases that do not become apparent until many years of exposure may be actionable if they are separate and distinct from an earlier medical problem caused by the same problem, even if the statute of limitations on the previous injury has expired." *Snyman v W.A. Baum Co.*, No. 04-CV-2709, 2008 U.S. Dist. LEXIS 76870, at \*15 (SDNY Sept. 30, 2008) (internal quotation marks omitted), *aff'd* 2010 U.S. App. LEXIS 749 (2d Cir. 2010); *see also Fusaro v Porter-Hayden Co.*, 145 Misc 2d 911 (Sup. Ct. NY Cty. 1989), *aff'd for reasons stated* 170 AD2d 239 (1st Dept 1991); *Shapiro v Ansell Perry, Inc.*, 291 AD2d 301 (1st Dept 2002). Further, it is axiomatic that personal injury claims are not lost simply because the injured party has died. EPTL § 11-3.2(b); *see also Heslin, supra*, 14 NY3d at 73. It is therefore immaterial that Mr. DiMaria filed his original asbestos-related personal injury claim in 1994 or that he passed away prior to amending the complaint. What is important is that plaintiffs amended the original complaint, which had alleged personal injuries arising from asbestosis, within three years of the manifestation of Mr. DiMaria's lung cancer, which is a separate and distinct disease from asbestosis and a "second injury" under the law. *See Fusaro, supra*. Therefore, plaintiffs' claims for personal injuries as they relate to Mr.

DiMaria's lung cancer are timely under CPLR 214-c.

Accordingly, defendant Kohler Co.'s motion to dismiss is granted in part and denied in part as set forth herein; and it is hereby

ORDERED that plaintiffs' cause of action for wrongful death is dismissed as against all defendants herein; and it is further


ORDERED that plaintiffs' cause of action for personal injuries relating to the decedent's lung cancer is severed and shall continue as against all defendants herein, including Kohler, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: November 16, 2011

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
NOV 17 2011  
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COUNTY CLERK'S OFFICE