

<b>Pisani v ACE Hardware Corp.</b>
2014 NY Slip Op 32367(U)
September 4, 2014
Supreme Court, New York County
Docket Number: 190062/14
Judge: Sherry Klein Heitler
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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). CPLR 210(a) provides that where “a person entitled to commence an action dies before the expiration of the time within which the action must be commenced and the cause of action survives, an action may be commenced by his representative within one year after his death.” Together these provisions afforded the decedent’s estate until March 4, 2013 to commence a personal injury action on his behalf. Inasmuch as plaintiffs did not commence this action until February 27, 2014, almost a full year after the limitations period had expired, plaintiffs’ personal injury claims against Kaiser Gypsum are time-barred.

EPTL § 5-4.1 provides that any action commenced by an estate representative to recover “for a wrongful act, neglect or default which caused the decedent’s death . . . must be commenced within two years after the decedent’s death . . .” While the Complaint in this case was filed within this two year time period, plaintiffs did not assert a cause of action for wrongful death therein. Plaintiffs’ cross-motion seeks leave to amend the Complaint accordingly.<sup>6</sup>

“It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party.” *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dept 2011). “Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’” *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 (1st Dept 2007) (quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). The decision whether to grant such leave is

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See Affirmation of Kardon Stolzman, Esq. dated June 20, 2014, ¶ 9.

generally left to the sound discretion of the trial court. *Oil Heat Inst. v. RMTS Assocs., LLC*, 4 AD3d 290, 293 (1st Dept 2004). In exercising its discretion the court should consider “how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom.” *Branch v Abraham & Strauss Dep’t Store*, 220 AD2d 474, 475 (2d Dept 1995).

The defendant’s reply does not address the merits of plaintiffs’ cross-motion and thus does not allege surprise or prejudice. See *Kocourek, supra*.<sup>7</sup> That being said, plaintiffs’ addition of a wrongful death cause of action is proper here because it relates back to the initial Complaint (see CPLR 203[f]<sup>8</sup>) which gives notice of the transactions and occurrences from which such cause of action arises. In fact, the Complaint consistently and unambiguously alleges that the defendants’ conduct caused Mr. Pisani to be seriously injured and that such injuries resulted in his death.<sup>9</sup>

Notwithstanding the foregoing, plaintiffs’ individual loss of consortium cause of action cannot continue. While “[s]uch a cause of action may be permitted to ‘reflect loss of consortium during the period of decedent’s conscious pain and suffering’ as part of a personal injury action” (*Monson v Israeli*, 35 AD3d 680, 681 [2d Dept 2006] quoting *Liff v Schildkrout*, 49 NY2d 622, 634 [1980]), a claim alleging loss of consortium “is not encompassed within a wrongful death action.” *Monson*,

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<sup>7</sup> The defendant’s reply asserts for the first time that plaintiffs are precluded from opposing its motion by the doctrines of issue preclusion and *res judicata*. In this regard the defendant refers the court to its May 19, 2014 decision which granted co-defendant Brand Insulation’s (“Brand”) motion to dismiss. However, this argument was not raised in its moving papers, and plaintiffs have had no opportunity to respond. *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993). In any event, this issue is moot insofar as plaintiffs’ personal injury and loss of consortium causes of action are dismissed as set forth herein.

<sup>8</sup> CPLR 203(f) provides that a “claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

<sup>9</sup> Complaint ¶¶ 65, 71, 81.

*supra*, at 681; *see also Liff, supra*, at 634 (“a claim for loss of consortium will not be recognized within a wrongful death action in this State.”)

Accordingly, it is hereby

ORDERED that Kaiser Gypsum Company, Inc.’s motion to dismiss is granted in part and denied in part; and it is further

ORDERED that, as against Kaiser Gypsum, to the extent plaintiffs seek to recover for plaintiffs’ decedent’s personal injuries, such claims are severed and dismissed in their entirety; and it is further

ORDERED that, as against Kaiser Gypsum, plaintiffs’ cause of action for loss of consortium is severed and dismissed in its entirety; and it is further

ORDERED that this action shall continue against the remaining defendants; and it is further

ORDERED that, in accordance with this order, plaintiffs’ motion to amend the Complaint is granted; and it is further

ORDERED that, within 20 days from the date hereof, plaintiffs shall amend the Complaint in the form annexed to its moving papers, and shall serve copies of the amended complaint along with copies of this order on all parties by E-file and regular mail; and it is further

ORDERED that all parties shall have the right to answer or otherwise appear within 20 days of such service; 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:**

*Sept 4, 2014*

  
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SHERRY KLEIN HEITLER, J.S.C.