Henry v Ploof
2018 NY Slip Op 34311(U)
July 3, 2018
Supreme Court, Albany County
Docket Number: Index No. A730-14
Judge: James H. Ferreira

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JACQUA HENRY,

Plaintiff,

-against-

ROGER A. PLOOF,

Defendant.

DECISION AND ORDER
Index No.: A730-14
RJI No.: 01-17-123544

(Supreme Court, Albany County, All-Purpose Term)

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HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiff seeks damages arising from his alleged childhood exposure to lead paint at property owned by defendant in Albany, New York. Defendant now moves for summary judgment dismissing the complaint on the ground that the action was not commenced within the relevant statute of limitations. Plaintiff opposes the motion and defendant has submitted a reply.

Plaintiff, who was born in January 1992, alleges in the complaint that he was exposed to lead paint between 1994 and 1997 when he resided at 570 Central Avenue, Albany, New York, property which was owned at that time by defendant. As detailed in his bill of particulars, plaintiff claims that

he suffered lead poisoning, as well as various cognitive and behavioral impairments arising from his exposure to lead, including brain damage, neurological, neurocognitive and neurobehavioral deficits and disorders, diminished cognitive function and lowered intelligence, abnormal social/behavioral development, deficits in attention and hyperactivity, and increased probability of future mental, developmental, emotional and psychological impairments.

This action was commenced on August 13, 2014. Generally, an action to recover damages for personal injuries must be commenced within three years of the date of the injury, although this statute of limitations is tolled while the plaintiff is an infant (see CPLR 208; CPLR 214). Here, it is undisputed that the three-year statute of limitations, as expanded by the infancy toll, had expired at the time plaintiff commenced this action in August 2014, and plaintiff has withdrawn any claim that the action is timely pursuant to CPLR 208 (see Memorandum of Law in Opposition, at 4). Plaintiff's position is that the action is timely pursuant to CPLR 214-c (2) and/or CPLR 214-c (4). Plaintiff maintains that he first became aware of his exposure to lead in August 2013 and commenced this action within one year thereafter.

In relevant part, CPLR 214-c (2) provides:

> "Notwithstanding the provisions of [CPLR] 214, the three year 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, in any form, upon or within the body . . . 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"

In addition, CPLR 214-c (4) provides:

> "Notwithstanding the provisions of subdivisions two and three of this section, where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should

> have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two and three of this section."

"For purposes of CPLR § 214-c, 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 v United States Min. Prods. Co., 92 NY2d 421, 429 [1998] [internal quotations and citation omitted]; see Aiken v General Elec. Co., 57 AD3d 1070, 1072 [3d Dept 2008]). Defendant bears the initial burden of establishing, prima facie, when plaintiff's cause of action accrued and that the statute of limitations has expired (see Vasilatos v Dzamba, 148 AD3d 1275, 1277 [3d Dept 2017]).

The Appellate Division, Third Department, recently addressed the application of CPLR 214-c (2) and CPLR 214-c (4) in an action to recover injuries arising from exposure to lead paint in childhood (see Vasilatos v Dzamba, 148 AD3d at 1275-1279). In that action, the plaintiff had elevated blood lead levels when she was a young child and exhibited certain symptoms during her childhood. She received services through her school district and was diagnosed with a learning disability, and she ultimately graduated high school pursuant to an individualized education program (hereinafter IEP). The plaintiff, who was 28 years old when she commenced her action, argued, among other things, that her action was timely pursuant to CPLR § 214-c (2) because she did not discover that she had suffered lead poisoning as a child until 2012, when she was an adult. The Court first held that, although lead poisoning itself is a patent injury for purposes of the statute of

limitations, claimed cognitive impairments allegedly caused by the lead poisoning are latent and within the ambit of CPLR § 214-c (2) (see id. at 1277). The Court held, however, that CPLR § 214-c (2) did not operate to toll the statute of limitations in that case. The Court stated:

> "Here, accepting that lead was the causative harmful substance, plaintiff was aware of her injuries, which first manifested when she started public education in 1990 and, according to plaintiff, continued throughout her school years. Although plaintiff argues that her action is timely because she first discovered that she suffered lead poisoning when her attorney sent a solicitation letter to her mother in 2012, we disagree. Where, as here, a plaintiff is seeking the benefit of the discovery rule applicable to toxic torts, the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom" (id. at 1278).

The Court also held that CPLR 214-c (4) did not apply. The Court noted that "[t]he dangers of exposure to lead-based paint, especially to young children, are well documented" and that there was evidence that the plaintiff's health care providers and educators had associated her cognitive impairments with lead poisoning during the 1990s (id. [internal quotation marks and citations omitted]).

Here, in support of his motion, defendant has offered copies of the pleadings and the deposition testimony of plaintiff and his mother, Annette Henry. Ms. Henry testified that she and her children – including plaintiff – lived at 570 Central Avenue in Albany, New York. She could not recall when they moved in but affirmed that she was living there in June 1995 when she received a letter from the Albany Department of Health and that she signed an amendment to the lease in September 1995. She testified that she observed chipped paint and paint chips inside and outside the residence. She testified that the Department of Health had inspected the residence while she lived there and found problems with lead paint. Ms. Henry testified that her children were tested for lead and that plaintiff's lead levels measured "pretty high;" she could not recall what his lead level

was (Affirmation in Support of Motion, Exhibit E, at 40). She testified that she did not ever see plaintiff putting paint chips in his mouth but that he "used to get in there, you know, and touch things" (id. at 41).

Ms. Henry testified that plaintiff did not attend preschool and started kindergarten at School 16 in Albany when he was six years old. She testified that he "did okay" in kindergarten (Affirmation in Support of Motion, Exhibit E, at 49). When asked whether she was told of any problems that he was having, she testified that, in first or second grade, he "tried to chop his little fingers off with the paper cutter" (id.). As a result of this incident, in fourth grade, he was sent to a group home called Parsons where he lived and went to school. She testified that she believed he was examined by a psychologist or psychiatrist at Parsons. She testified: "[H]e was . . . acting out and he was wound up, because every time I turned around, the school, Parsons, was calling me telling me . . . they don't know why he's . . . don't keep still" (id. at 51). She affirmed he was on asthma medication and also was put on "some kind of" medication at Parsons but she did not know what the medication was for (id.). She testified that she went to meetings at Parsons; they discussed plaintiff's behavior, which Ms. Henry characterized as "act[ing] up" and "[n]ot doing what he's supposed to do" (id. at 52). She described him as a "typical little boy" and testified that he "got into trouble" in the neighborhood (id. at 53-54). Ms. Henry testified that, while he was at Parsons, plaintiff spent about a month or two at Four Winds, a clinic for kids with bad behavior. She testified that plaintiff later got "involved with Children and Family Services" after Parsons made a complaint and that he also spent time at a residential facility called Berkshire Farm (id. at 54). She explained: "[N]obody knew what was wrong with him. He was always, you know, doing things. He didn't do his work. You tell him to do his work, he wouldn't do his work. He didn't want to, you know,

participate or nothing. And not in the schoolwork anyway" (id. at 54-55). She testified that his grades were good, however, and that she had a conversation with a psychiatrist at Parsons, who indicated that the medication was helping. She testified that plaintiff did not receive any special help with his schoolwork and did not have an IEP while at School 16 or at Parsons. She testified that he did not graduate from high school and went to prison in 2000. She stated that no one had ever told her that his problems were due to lead poisoning.

Plaintiff testified, in relevant part, that he does not remember living at 570 Central Avenue. He went to School 16 for elementary school; he testified that he did not remember having any special services there. He thereafter resided and attended school at several group homes "because no school in Albany would take [him]" (Affirmation in Support of Motion, Exhibit D at 17). He testified that he was first sent to Parsons due to behavioral issues. He attended high school at an Office of Child and Family Services facility, where he went when he was 13 or 14 years old because he "kept misbehaving" (id. at 13). He testified that all of the classes at that school are "regular" and that he does not know what an IEP is (id. at 15). He never received any additional help for schoolwork and was never told that he had ADHD or OCD. He testified that his problems were "[j]ust misbehaving. Not following instructions. No doing my class work. Being destructive in class" (id. at 21). He testified that he had these issues "a little bit" at School 16 (id. at 21). He stated that he has no problems with reading, writing or math. He dropped out of high school in eleventh grade. Plaintiff testified that he had never been told that his behavioral problems were due to his ingesting lead as a child and that he had not seen a doctor because of the lead poisoning that he alleges that he suffered from. He testified that, aside from asthma, he had not sought medical treatment for any issues; he testified that he never goes to the doctor and does not have a primary care physician.

Upon review, the Court finds defendants' evidence, summarized above, sufficient to establish that plaintiff's claim is time-barred. As noted above, there is no dispute that the action was not commenced within the three-year period set forth in CPLR 214, even after applying the toll for infancy. The evidence also demonstrates that the action is not timely pursuant to CPLR 214-c (2). The injuries which plaintiff and his mother described during their deposition testimony – primarily behavioral issues – have all been present in plaintiff's life since his childhood. Plaintiff has not offered any evidence raising an issue of fact on this point. There is no indication in the record that plaintiff suffered any injuries or issues which appeared or manifested at a later date which may serve to toll the statute of limitations pursuant to CPLR 214-c (2). Therefore, because plaintiff was aware, during his childhood, of the injuries for which he now seeks damages, or reasonably should have been, CPLR 214-c (2) does not operate to toll the statute of limitations (see Haynes v Williams, __ AD3d __, ___, 2018 NY Slip Op 04626, * 2 [3d Dept 2018]; Vasilatos v Dzamba, 148 AD3d at 1278).

The Court also rejects plaintiff's contention that CPLR 214-c (4) applies to extend the statute of limitations in this case because plaintiff did not learn of his exposure to lead until 2013. The Legislature enacted CPLR 214-c (4) to address "the problem that arises when the plaintiff has discernible bodily symptoms but the toxic etiology of those symptoms has not yet been discovered" (Matter of New York County DES Litig., 89 NY2d 506, 512 [1997]). As such, this provision applies to extend the statute of limitations "only where it is shown that 'technical, scientific or medical knowledge and information sufficient to ascertain the cause of [his] injury had not been discovered, identified or determined' " (Vasilatos v Dzamba, 148 AD3d at 1278, quoting CPLR 214-c [4]). As the Appellate Division, Third Department has noted, "[t]he dangers of exposure to lead-based paint,

especially to young children, are well documented" (Vasilatos v Dzamba, 148 AD3d at 1278 [internal quotation marks and citations omitted]), and plaintiff has not argued otherwise. Therefore, the Court finds that the statute of limitations was not tolled pursuant to CPLR 214-c (4).

Based upon the foregoing, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for defendant. A copy of the Decision and Order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision and Order, and delivery of a copy shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED

ENTER.

Dated: Albany, New York
July 3, 2018

James H. Ferreira
Acting Justice of the Supreme Court

7/10/18

Papers Considered:

1. Notice of Motion, dated January 3, 2018;
2. Affidavit in Support of Motion by Alan R. Peterman, Esq., sworn to January 3, 2018, with attached exhibits;
3. Memorandum of Law in Support by Alan R. Peterman, Esq., dated January 3, 2018;
4. Affirmation in Opposition by Elizabeth A. Allers, Esq., dated February 9, 2018, with attached exhibits;
5. Memorandum of Law in Opposition by Elizabeth A. Allers, Esq., dated February 9, 2018;
6. Reply Affidavit in Support by Alan R. Peterman, Esq., sworn to February 13, 2018, with attached exhibits;
7. Reply Memorandum of Law in Support by Alan R. Peterman, Esq., dated February 13, 2018.