Adams v Koch
2019 NY Slip Op 34070(U)
January 17, 2019
Supreme Court, Albany County
Docket Number: 16-900031
Judge: Michael H. Melkonian

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHAREKA ADAMS,

Plaintiff,

-against-

DECISION AND ORDER

RICHARD KOCH, Individually, and as the Administrator of the Estate of CYNTHIA KOCH,

Defendant.

(Supreme Court, Albany County, Motion Term, November 6, 2018)
Index No. 16-900031
(RJI No. 01-17-123376)

(Acting Justice Michael H. Melkonian, Presiding)

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MELKONIAN, J.:

In this action, plaintiff Shareka Adams ("plaintiff") seeks damages for injuries allegedly caused by her childhood exposure to lead paint at a property owned by defendant Richard Koch, Individually, and as the Administrator of the Estate of Cynthia Koch

("defendant"). 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, asserting that the action was timely commenced under CPLR § 214–c(2).

Plaintiff, who was born on April 2, 1985, alleges in the complaint that she was exposed to lead paint from approximately June 1989 to November 1990, while she resided at 165 Second Avenue, Albany, New York, a property owned by defendant. As alleged in her Bill of Particulars and Amended Bill of Particulars, plaintiff suffered lead poisoning, as well as various cognitive and behavioral impairments arising from her exposure to lead, including brain damage; major neurological neurocognitive and neurobehavioral disorder; disability which limits: educational attainment, choice of occupation, future labor force activity, future full time work, future income and earnings, and future employability; severe emotional and psychological harm and pain and suffering; increased probability of future mental and developmental impairments, emotional and psychological impairments; and further neurological and neurobehavioral damage.

This action was commenced on January 8, 2016. 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, plaintiff does not dispute that the three-year statute of limitations, as expanded by the infancy toll, had expired at the time she commenced this

action in January 2016.

In opposition, plaintiff argues that the action was timely pursuant to CPLR § 214-c (2).[1] CPLR § 214-c(2) provides, in relevant part: "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" (CPLR § 214–c [2]; accord, Caronia v Philip Morris USA, Inc., 22 NY3d 439, 448 [2013]; Vasilatos v Dzamba, 148 AD3d 1275, 1276–1277 [3rd Dept. 2017]; Haynes v Williams, 162 AD 3d 1377 (3rd Dept. 2018). As the Court of Appeals has held, "when the Legislature used the phrase 'discovery of the injury' it meant discovery of the physical condition and not ... the more complex concept of discovery of both the condition and the nonorganic etiology of that condition" (Matter of New York County DES Litig., 89 NY2d 506, 514 [1997]; see, Vasilatos v Dzamba, 148 AD3d at 1278).

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 at 1277; see, also, Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168

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[1]Plaintiff has withdrawn any reliance on the statute of limitations found in CPLR § 214-c(4).

AD2d 822 [3rd Dept. 1990]; Larkin v Rochester Housing Authority, 81 AD3d 1354, 1355 [4th Dept. 2011]; Swift v New York Med. Coll., 25 AD3d 686 [2nd Dept. 2006]).

The Appellate Division, Third Department, recently addressed the application of CPLR § 214-c(2) to an action to recover injuries arising from exposure to lead paint in childhood (see, Vasilatos v Dzamba, 148 AD3d at 1275-1279). In Vasilatos, an Order which reversed this Court's Decision and Order, 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 (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 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).

Here, the evidence submitted by defendant in support of his motion, including, *inter alia*, the pleadings, an affirmation of counsel, a memorandum of law, a copy of plaintiff's examination before trial testimony, a copy of the examination before trial testimony of plaintiff's mother, and plaintiff's medical records, demonstrates that plaintiff was diagnosed with lead poisoning as early as August 1987, when she was two years old, and was admitted to Albany Medical Center for treatment.[2] Plaintiff's primary assessment at Albany Medical Center was listed as "Acute Pb intoxication" (lead poisoning). Records from the New York State Health Department demonstrate that plaintiff was tested at least three times for elevated lead levels between August 1987 and October 1990 and was found to have elevated lead blood levels. Plaintiff's medical records from Albany Medical Center dated August 31, 1987

[2]On August 28, 1987, plaintiff's blood level was 77 ug/dL.

reflect that plaintiff was noted by her mother to have been peeling paint from the walls of their apartment for more than six months and eating this paint. Plaintiff was also noted to have PICA, an eating disorder typically defined as the persistent ingestion of non-nutritive substances. Karen Adams, plaintiff's mother, testified that she was told by a doctor that plaintiff and plaintiffs brothers — Antoine and Jamel — had elevated blood lead levels. Plaintiff's mother further testified that "they took [Antoine, Jamel and Shareka] upstairs at Albany Medical Center . . . and that's how I knew that they had it." She testified that plaintiff and her brothers were admitted to Albany Medical Center for a week. When plaintiff's mother was asked whether a doctor spoke to her about her children's elevated blood lead levels, she testified: "I'm quite sure he did, it's just been so long ago." Plaintiff's mother further testified that she caught plaintiff eating paint chips while living at 165 Second Street. She also testified that plaintiff had issues with sitting still starting when plaintiff was in kindergarten, and that plaintiff was experiencing problems remembering when she was in first grade. At her deposition, plaintiff testified that in kindergarten and first grade, her behavioral issues were "... not being able to sit still, Moving a lot." Plaintiff remembered junior high school being hard. Plaintiff testified that in sixth grade, "things got harder" and that she had trouble focusing. Plaintiff additionally testified, "It's like kind of hard to focus and just sit still for a long time." She testified that she got into a fight in junior high school and was suspended. When asked about her grades in junior high school, she stated "I don't think they were that good." In fact, she testified that she had to repeat the eighth grade. She

testified that her struggles in English and history related to the amount of reading and writing that she had to do and her problems focusing. Plaintiff testified that in high school, she skipped her English and history classes because they were difficult in light of her trouble focusing. She testified that she also recalls being suspended in high school. She testified that she still struggles with English and history.

Plaintiff further testified that she has had problems with her memory "for a long time." When asked if she has had memory issues for more than twenty years, she stated, "It might be all my life." When asked how long she has had problems sitting still, she testified "Kind of like all my life I remember." In fact, plaintiff testified that she stopped working at Ticketmaster because it was "[h]ard [for her] to sit still." She also testified that she has suffered from headaches since she was in school and continues to suffer from headaches.

The Court finds that defendant has met his initial burden. The injuries which plaintiff (and her mother) described during plaintiff's deposition testimony – including memory problems, issues with sitting still, headaches, trouble focusing – have been present in plaintiff's life since she was very young and continue to the present day. The record contains no evidence of any claimed injuries which appeared or manifested at a later date which would serve to toll the statute of limitations pursuant to CPLR § 214-c(2) (see, Vasilatos v Dzamba, 148 AD3d at 1275 – 1279).

In opposition, plaintiff argues that she was not aware of her exposure to lead until February 2013 when her mother received a solicitation letter from her attorney and, as such,

the complaint was timely. Plaintiff also argues that she could not be considered to have discovered her injury prior to 2013 because there is no scientific evidence directly linking the claimed injuries to lead poisoning. Both of these arguments are without merit as, as afore stated, "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" (Vasilatos v Dzamba, 148 AD3d at 1278; see, Matter of New York County DES Litig., 89 NY2d at 513; Krogmann v Glens Falls City School Dist., 231 AD2d 76, 78–79 [3rd Dept. 1997]). The Court is not persuaded by plaintiff's argument that the instant case is distinguishable from Vasilatos v Dzamba because plaintiff was not actually diagnosed with any type of learning disability (i.e. ADD or ADHD) and did not receive any special services in school (i.e. an IEP). Here, as in Vasilatos and Haynes v Williams, 162 AD 3d 1377 (3rd Dept. 2018), plaintiff was aware, during her childhood, of the symptoms of the cognitive deficits for which she now seeks damages. More specifically, plaintiff was aware that she had trouble focusing, that she did not do well in school (including having to repeat the eighth grade), that she suffered from headaches, that she had behavioral issues (including two instances of being suspended from school), and that she had trouble sitting still. The Court notes that the legislative purpose of CPLR § 214-c(2) is to "provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitation period had expired" (Jensen v General Elec. Co., 82 NY2d 77, 84 [1993]). As such, because plaintiff was aware of her

claimed conditions or symptoms, or reasonably should have been, during her childhood, CPLR § 214-c(2) does not operate to toll the statute of limitations (see, Vasilatos v Dzamba, 148 AD3d at 1278). Moreover, CPLR § 214-c(2) does not require an actual diagnosis of an injury to trigger the statute of limitations.

Accordingly, defendant's motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
January 17, 2019

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

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Papers Considered:

(1) Notice of Motion dated September 19, 2018;
(2) Affirmation of Breanna M. Staffon, Esq., dated September 19, 2018, with exhibits annexed;
(3) Memorandum of Law dated September 19, 2018;
(4) Affirmation of Mo Athari, Esq., dated October 17, 2018, with exhibits annexed;
(5) Affidavit of Andy Lopez-Williams, Ph.D, dated October 12, 2018, with exhibits annexed;
(6) Memorandum of Law dated October 19, 2018;

(7) Affirmation of Breanna M. Staffon, Esq., dated November 1, 2018;
(8) Memorandum of Law dated November 1, 2018.