

Baldi v ABB, Inc.

2022 NY Slip Op 30856(U)

March 14, 2022

Supreme Court, New York County

Docket Number: Index No. 190217/2020

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART 13

Justice

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DOMINIC BALDI,

Plaintiff,

- v -

ABB, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ITE CIRCUIT BREAKERS, INC., D/B/A BULLDOG, AERCO INTERNATIONAL, INC., BETHPAGE UNION FREE SCHOOL DISTRICT, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORG-WARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COOPER INDUSTRIES, LLC, CRANE CO., EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CUTLER-HAMMER, INC., ECR INTERNATIONAL, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DUNKIRK, DUNKIRK BOILERS AND UTICA BOILERS, ELECTROLUX HOME PRODUCTS, INC., INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC., SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO CHICAGO PUMP COMPANY, PEERLESS PUMP COMPANY, AND NORTHERN PUMP COMPANY, FORT KENT HOLDINGS, INC. F/K/A DUNHAM-BUSH, INC., FOSTER WHEELER ENERGY CORPORATION, GARDNER-DENVER, INC., GENERAL ELECTRIC COMPANY, GOULD ELECTRONICS, INC., INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO AND D/B/A BULLDOG, GOULDS PUMPS, INC., GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO BELL & GOSSETT, AND HOFFMAN SPECIALTY, IMO INDUSTRIES, INC., KEELER-DORR-OLIVER BOILER CO., LAWRENCE SCHOOL DISTRICT, MACK TRUCKS, INC., MALVERNE UNION FREE SCHOOL DISTRICT, THE MASSAPEQUA UNION FREE SCHOOL DISTRICT, MINEOLA UNION FREE SCHOOL DISTRICT, MINNESOTA MINING & MANUFACTURING COMPANY, A/K/A 3M

INDEX NO. 190217/2020

MOTION DATE 08/30/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

COMPANY, NASH ENGINEERING COMPANY (THE), NAVISTAR, INC., A/K/A INTERNATIONAL TRUCK & ENGINE F/K/A INTERNATIONAL HARVESTER, INC., NORTH BELLMORE SCHOOL DISTRICT, RILEY POWER, INC., INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO UNION IRON WORKS, ERIE PA, SCHNEIDER ELECTRIC USA, INC., FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC., SPIRAX SARCO, INC., THREE VILLAGE CENTRAL SCHOOL DISTRICT (SETAUKET SCHOOL DISTRICT), UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARD LEONARD ELECTRIC CO., WARREN PUMPS LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEST ISLIP SCHOOL DISTRICT, WILLIAM FLOYD SCHOOL DISTRICT, YORK INTERNATIONAL CORPORATION, AS SUCCESSOR IN INTEREST TO YORK CORPORATION, ZURN INDUSTRIES, LLC INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ERIE CITY IRON WORKERS CORPORATION, AMITYVILLE UNION FREE SCHOOL DISTRICT, BALDWIN UNION FREE SCHOOL DISTRICT, BAYPORT-BLUE POINT UNION FREE SCHOOL DISTRICT, BELLMORE-MERRICK CENTRAL HIGH SCHOOL DISTRICT, BETHPAGE UNION FREE SCHOOL DISTRICT, CARLE PLACE SCHOOL DISTRICT, EAST HAMPTON UNION FREE SCHOOL DISTRICT, EAST MEADOW SCHOOL DISTRICT, ELWOOD UNION FREE SCHOOL DISTRICT, GARDEN CITY UNION FREE SCHOOL DISTRICT, GLEN COVE CITY SCHOOL DISTRICT, HERRICKS UNION FREE SCHOOL DISTRICT, HICKSVILLE UNION FREE SCHOOL DISTRICT, LAWRENCE SCHOOL DISTRICT, LINDENHURST UNION FREE SCHOOL DISTRICT, LOCUST VALLEY CENTRAL SCHOOL DISTRICT, MALVERNE UNION FREE SCHOOL DISTRICT, MILLER PLACE SCHOOL DISTRICT, MINEOLA UNION FREE SCHOOL DISTRICT, NORTH BELLMORE SCHOOL DISTRICT, NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, NYC DEPARTMENT OF EDUCATION, NYC SCHOOL CONSTRUCTION AUTHORITY, NYC THE CITY OF NEW YORK, PLAINEDGE UNION FREE SCHOOL DISTRICT, PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT, ROCKY POINT UNION FREE SCHOOL DISTRICT, SCARSDALE UNION FREE SCHOOL DISTRICT, SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT, SOUTH COUNTRY CENTRAL SCHOOL DISTRICT, SYOSSET CENTRAL SCHOOL DISTRICT, THE MASSAPEQUA UNION FREE SCHOOL DISTRICT, THREE VILLAGE CENTRAL SCHOOL DISTRICT, WANTAGH UNION FREE SCHOOL DISTRICT, WILLIAM FLOYD SCHOOL DISTRICT, PARKER JEWISH INSTITUTE FOR HEALTH CARE AND REHABILITATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 248, 249, 250, 251, 252, 253, 254, 255, 452, 487, 515, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 854, 855, 856, 857, 858, 859, 860, 861

were read on this motion to/for

MISC. SPECIAL PROCEEDINGS

Upon the foregoing documents, it is hereby ordered that Plaintiff's order to show cause seeking leave to serve a late notice of claim is granted and Defendant Amityville Union Free School District's (hereinafter referred to as "Amityville") cross-motion to dismiss the complaint is denied for the reasons set forth below.

Here, Plaintiff was diagnosed with lung cancer on or about November 6, 2019. Plaintiff was an electrician who worked in public schools and was exposed to asbestos during the course of his employment. The instant action was commenced on August 20, 2020, by summons and verified complaint. Prior to the commencement of this action, Plaintiff made two attempts to retain law firms specializing in asbestos exposure claims. While Plaintiff's first two attempts to retain legal counsel were unsuccessful, Plaintiff retained his current counsel on March 26, 2020. A mere three weeks later, Plaintiff filed the Notice of Claim on April 10, 2020, putting Amityville on notice of the instant matter. Subsequently, Plaintiff filed the instant order to show cause on August 23, 2021 to serve a late Notice of Claim upon Amityville.

Amityville argues "[t]he Court of Appeals expressly rejected the precise argument which Plaintiff asserts in his Notice of Claim – namely, that his cause of action accrued upon receipt of his lung cancer diagnosis on November 6, 2019". Notice of Cross-Motion to Dismiss Plaintiff's Complaint on Behalf of the School Districts p.13, ¶ 54. According to Amityville, "it is the manifestation of symptoms which starts the statute of limitations clock running, not the actual date that a formal diagnosis of the specific condition is made". *Id.* at ¶ 9 (internal emphasis omitted).

According to Plaintiff, the accrual date was in fact “November 6, 2019, the date that Dominic Baldi was diagnosed with lung cancer.” Order to Show Cause, Affirmation, ¶ 16. Further, Plaintiff contends that the Notice of Claim should be deemed timely, as the executive orders due to the COVID-19 pandemic tolled the one year and ninety-day period to file a Notice of Claim.

Defendants rely upon *Wetherill v Eli Lilly & Co.*, 89 NY2d 506, 513 (1997), where the Court of Appeals held that “for all intents and purposes, discovery that a plaintiff’s symptoms were attributable to an injury inflicted by an outside force is the same as ‘discovery of the cause of the injury’ within the meaning of CPLR 214–c(4)”. The plaintiff in *Wetherill* first learned in 1988 that her reproductive injuries could have been caused by her mother consuming a harmful drug, diethylstilbestrol (DES). However, such plaintiff relied upon the 1989 date in which she overheard her treating physician state that she had classic symptoms of DES, as the date her claim accrued. The Court of Appeals rejected that notion, and instead relied upon the date in which the discovery of the cause of injury could have been linked to the illness itself.

Here, defendants’ heavy reliance upon the *Wetherill* case fails. Preliminarily, the Court notes that the Court of Appeals in *Wetherill* did not hold that the plaintiff’s claim began to accrue at the manifestation of the first symptom, as such first symptom, i.e. a miscarriage, occurred in 1980. Rather, the *Wetherill* court held that the plaintiff’s cause of action accrued in 1988, eight years after the plaintiff’s first symptom, when the plaintiff first obtained knowledge that her reproductive symptoms could be linked to her own mother’s usage of DES. Similarly, Plaintiff Baldi’s claim did not begin to accrue on the date of his first symptoms in 2017. As in *Wetherill*, Plaintiff Baldi’s claim accrued when he obtained some knowledge of “the primary conditions that form the basis of Plaintiff’s claim”. *Id.* at 514. In the instant case, the discovery of the cause

of injury occurred at the time of diagnosis. The Plaintiff testified at his 50-h hearing that he “was doing a lot of coughing and coughing and I start spitting up blood, so I went to my primary doctor.” See Order to Show Cause, Exh. B, Baldi Depo. Tr., p. 67, ln 5-7. Plaintiff also testified that after he went for a CAT scan and X-ray, and the doctors saw that he had a glass nodule on his right lung, his pulmonary doctor told him to wait at least six months to see if it has grown in size. Plaintiff also went for a PET scan, and it came up that the Plaintiff did not have cancer. It was only after forty percent of Plaintiff’s lung was removed via a biopsy to detect cancer that the doctors told him he had an asbestos related cancer. Therefore, the discovery of the cause of the injury occurred at the time he was diagnosed with the illness, rather than manifestation of the first symptoms.

Plaintiff also contends that leave to file the late Notice of Claim should be granted as “the Statutes of limitations were ‘tolled’ in New York by Executive Order No. 202.8, issued by Governor Andrew M. Cuomo on March 20, 2020, in response to the COVID-19 pandemic.” Order to Show Cause, Affirmation, p.5, ¶ 11. Furthermore, “[o]ver the next six and a half months, that toll was renewed by further executive orders every 30 days until, on October 4, 2020. . . the tolling order would be extended for only one more 30 day period ‘until November 3, 2020’”. *Id.* at p.6, ¶ 12. In this case, Plaintiff’s cause of action began to accrue when Plaintiff was diagnosed with lung cancer, which was November 6, 2019. As the statute of limitations was tolled due to Governor Cuomo’s Executive Orders, Plaintiffs notice of claim filed on April 10, 2020 is deemed timely. Further, “[o]ne factor the court must consider is ‘whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.’” *Matter of Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 461 (2016). Here, Plaintiff attempted to seek counsel and was unable to retain legal counsel until

March 26, 2020, at which time the world was greatly affected by the COVID-19 pandemic. Defendant fails to even allege prejudice. Thus, Plaintiff's order to show cause is granted. As Plaintiff's order to show cause is granted, Defendant's cross-motion to dismiss is denied.

Accordingly, it is

ORDERED that Plaintiff's Order to show cause is granted and the Notice of Claim filed on April 10th, 2020 is hereby deemed timely served; and it is further

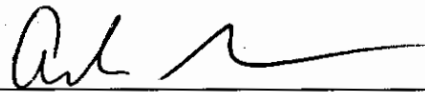
ORDERED that Defendant's cross motion to dismiss Plaintiff's complaint is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.

3/14/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: