SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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ROY W SECORD,

Plaintiff,

- v -

CITYARTS, INC.,NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, NEW YORK SCHOOL CONSTRUCTION AUTHORITY

Defendant.

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INDEX NO. 160279/2022

MOTION DATE 12/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for DISMISS.

In the underlying action, plaintiff claims that while working on an art project at the Urban Assembly High School for Green Careers, located at 145 W. 84th Street, New York, New York 10024 ("subject premises"), he sustained personal injuries, including a diagnosis of rhabdomyolysis and persistent human leptospirosis ("PHL"), stemming from a rat infestation at the subject premises.

Defendant the NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (the "SCA") filed a motion (Motion Sequence #001) seeking an order dismissing the Complaint pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(5) on the grounds that the Complaint fails to comply with the applicable statute of limitations ("SOL") in accordance with General Municipal Law ("GML") 50-I; and (b) CPLR 3211(a)(1) and CPLR 3211(a)(7).

On April 21, 2023, counsel submitted a stipulation on consent (NYSCEF Doc. No. 36) wherein this action was discontinued with prejudice as against the SCA, without costs to any party. Accordingly, SCA's motion is hereby closed as moot.

Also pending under this same motion sequence number are two cross-motions. One cross-motion was filed by defendants New York City Department Of Education and The City Of New York (collectively, the "City") in which the City defendants seek an order dismissing the Complaint under CPLR 3211(a)(5) for plaintiff's failure to comply with the SOL.

The other cross-motion was filed by plaintiff and seeks an order:

1) denying the SCA's motion;[1] and
2) granting plaintiff leave to serve an Amended Notice of Claim pursuant to GML 50-e (6) because of mistake, omission, irregularity, or defect; and
3) deeming plaintiff's annexed proposed Amended Notice of Claim as timely filed and served upon defendants NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, AND NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, *nunc pro tunc*.

Although an affidavit of service (NYSCEF Doc. No. 16). is on file with the court, there has been no appearance by defendant Cityarts, Inc.

Plaintiff's counsel Kenneth Zweig, Esq. and defendant's counsel, Christine Limbach, Esq. appeared before the undersigned today and oral arguments on the motion were heard on the record.

[1] As noted above, SCA is no longer a defendant in this action, so this, and other branches of plaintiff's motion seeking relief as against SCA are moot.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Per the New York Court of Appeals, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties Regarding the Cross-Motions

The City argues that plaintiff's Complaint was filed after the expiration of the applicable SOL. Specifically, the City argues, plaintiff's testimony shows that he was exposed to rat feces on August 5, 2021 and first noticed symptoms the next day, on August 6, 2021. Accordingly, the City argues, plaintiff's cause of action accrued on August 6, 2021, which is the day of the "emergence of the primary conditions that form the basis of the plaintiff's claim." Therefore, plaintiff's Complaint, filed on December 1, 2022, was beyond the 1 year and 90 day SOL that governs claims filed against City defendants, and must be dismissed.

Plaintiff, on the other hand, argues that the NOC and Complaint erroneously state that plaintiff's injuries arose on August 5, 2021, when in fact plaintiff's injuries were sustained beginning on April 29, 2021, and continuing through and including September 15, 2021.

Specifically, plaintiff argues that he "was only able to discover what the exposure to the rat feces/urination had done to his body, after being bedbound for upwards of one (1) month until approximately September 15, 2021." Plaintiff argues that the cause of action therefore accrued on September 15, 2021, because this action is a toxic tort and "the statute of limitation for toxic torts are not triggered until the discovery of the injury." Plaintiff argues that prior to September 15, 2021, he was unaware that his symptoms were related to the latent effects of being exposed to rat urine/feces, and in fact, plaintiff initially believed that his symptoms were the result of COVID. In support of his arguments, plaintiff submits, *inter alia*, a sworn Affidavit (NYSCEF Doc. No. 21) from plaintiff himself that states, in part:

> 7. As a result of my injuries, I was bedbound for approximately one (1) month from August 8, 2021 through September 15, 2021. I spent the next month trying to be ambulatory again.
>
> 8. It was not until I began being able to become ambulatory again that I discovered the cause of my injuries was my exposure to the toxic rat feces and urine while working at the Urban Assembly School for Green Careers.

Plaintiff argues that because this action was filed within 1 year and 90 days of the date of his discovery, this action is timely. Plaintiff seeks to amend the NOC to reflect the proper accrual date of September 15, 2021. Plaintiff also argues that the City waived their right to the defense of the statute of limitations because in its Answer, the City only included the affirmative defense of the statute of limitations "amongst a slew of boilerplate affirmative defenses," and hence, this defense was not properly pleaded.

In reply, the City argues that the caselaw clearly provides that a claim accrues on the day that a plaintiff discovers his injuries, not on the day when he is given a formal diagnosis by a doctor. With respect to having waived any defense based on the SOL, the City argues that their Answer clearly states the SOL as an affirmative defense. Finally, the City argues that plaintiff seeks to circumvent the statute of limitations by altering the correct accrual date originally provided in the NOC (August 5, 2021), and that plaintiff has now chosen a new accrual date (September 15, 2021) for the sole purpose of making his complaint against the municipal defendants timely.

CONCLUSIONS OF LAW

The court first addresses plaintiff's argument that the City failed to properly plead the SOL as an affirmative defense in their Answer. The Answer (NYSCEF Doc. 18) clearly states:

> AFFIRMATIVE DEFENSE(S)
> […]
>
> 10. The action on behalf of the plaintiff(s) is barred by reason of the fact that it was not commenced within the time provided by the Statute of Limitations.

This defense regarding SOL is set apart, in its own paragraph, and hence the court disagrees with plaintiff's argument that this was only included "amongst a slew of boilerplate affirmative defenses." The court therefore finds that the defense regarding the SOL was properly pleaded, and considers this issue on the merits.

Here, the following facts and timeline are set forth in both parties' papers, and are not in dispute: Plaintiff was working on an art installation at the Urban Assembly High School For Green Careers, where he frequently observed rats at the subject premises. On August 5, 2021, plaintiff worked without gloves and is believed to contracted an infection from being exposed to rat

excrement on that day. Per plaintiff's testimony at his 50-h hearing (transcript at NYSCEF Doc 41): "I presume that was my day of infection because I was completing installation of the mosaics by grouting all the surfaces, and just because of the nature of grouting I had micro-abrasions on my hands, and the following morning I was, I had what I presumed was infection in my hands" (p. 48-49). The following day, on August 6, 2021, plaintiff first noticed the symptoms of his infection when he woke up with hands that were "reddish" and "extremely sore and inflamed" (p. 46-47). Three days later, on August 9, 2021, plaintiff sought medical attention at an emergency care center in this neighborhood after experiencing a fever and joint pain. Three days after that, on August 12, 2021 plaintiff went to the emergency room. Per plaintiff: "When I went into the ER I told them that I was having extreme joint paint, that I could barely walk, that I was having migraine headaches, that I had a fever, and also I felt I had received infection through my hands through micro-abrasions, and I was afraid I could possibly have had a rat-transmitted infection" (p. 61).

In the Affidavit from plaintiff (described above), which was submitted as part of this motion sequence, plaintiff testified that he was subsequently bedbound for about one month, from approximately August 8 through September 15, 2021, and it was not until he became ambulatory again that he discovered the cause of his injuries.

Although parties agree on the timeline and general facts, they disagree on the accrual date in this case. The City argues that plaintiff's cause of action accrued either on August 6, 2021, when plaintiff woke up with hands that were "reddish" and "extremely sore and inflamed," or, at the latest, on August 12, 2021,[2] when plaintiff went to the emergency room with extreme joint pain, migraine headaches, and a fever. Plaintiff argues that the cause of action accrued as late as

[2] It is undisputed that an accrual date of August 12, 2021 would mean the Complaint was filed outside the SOL.

September 15, 2021, as that was the date that plaintiff discovered that his symptoms were caused not by Covid, but by being exposed to rat urine/feces.[3]

The Appellate Division First Department has clearly held that when dealing with exposure to toxic substances, a claim accrues on the day that a plaintiff discovers his injuries, not on the day when he is given a formal diagnosis by a doctor.[4] *See, e,g.:* Goffredo v City of New York, 33 AD3d 346 (1st Dept 2006):

> Where, as here, the claimed injury results from exposure to a harmful substance, the action accrues upon "discovery of the manifestations or symptoms of the latent disease that the harmful substance produced." The diagnosis of petitioner's illness occurred on February 27, 2003. *However, petitioner's medical records demonstrate that the symptoms manifested themselves on or about December 19, 2001*. Since petitioner commenced the initial proceeding on or about December 23, 2003, approximately two years after his claim accrued, his initial petition was untimely and subject to dismissal. [internal citations omitted] [emphasis added];

Martin v 159 W. 80 St. Corp., 3 AD3d 439 (1st Dept 2004):

> Plaintiff alleges that from 1993 to date, ongoing water leaks in her apartment, which defendants failed to resolve, continuously exposed her to toxic mold, fungi and other environmental conditions that have caused her to suffer respiratory, immunological and neurological problems for approximately five years prior to 2001. However, it was not until 2001, when repairs on a defective boiler in the building exacerbated the leakage problems and for the first time caused the odor of mildew and the appearance of black mold on the interior walls of her apartment, that plaintiff became aware of the presence of these conditions and hired a registered environmental assessor and air quality consultant to inspect her apartment. The consultant performed air quality tests which demonstrated high levels of bacteria and fungi in her apartment, and, in particular, significant amounts of Stachybotrys Chartarum, a highly toxic fungus which can adversely affect the health of human beings through inhalation, ingestion and skin contact.
>
> Defendants move for dismissal under CPLR 3211(a)(5), based upon the expiration of the statute of limitations […]

[3] At oral argument, counsel reported that plaintiff tested negative for COVID that same day, on August 12, 2021.

[4] Plaintiff's counsel asserted at oral arguments, that plaintiff's medical records show that plaintiff did not receive a formal diagnosis until October 22, 2021. Plaintiff's medical records were not produced as part of the motion and plaintiff does not contend that October 22, 2021 is the date the claim accrued.

> *The three-year statute of limitations*[5] *of CPLR 214–c(2) runs from the time a plaintiff discovers an injury, that is, from the time she realizes that she has the physical manifestations of illness, regardless of when she learns of the cause.* Because plaintiff here experienced the physical manifestations of her illness for five years prior to 2001, the statute of limitations on plaintiff's personal injury action clearly expired pursuant to CPLR 214–c(2) prior to her commencement of this action.
>
> *Nor may plaintiff rely upon the extension of the limitations period created by CPLR 214–c(4). That provision permits a plaintiff who did not discover the cause of the illness until up to five years after manifestation of the injury to bring an action within one year after discovery of its cause, only where the plaintiff can both plead 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." That provision cannot be relied upon here, because plaintiff has not alleged that the medical or scientific community in general lacked information that molds such as those in the apartment could be the cause of her illness.*
>
> [internal citations omitted] [emphasis added];

Magidson v Otterman, 57 AD3d 264 (1st Dept 2008):

> Plaintiff alleges injury caused by exposure to toxic substances in her apartment. Her claim accrued at the latest in the fall of 1991, *when she acknowledges having become aware of her injury*. The statute of limitations thus expired in late 1994, prior to the commencement of this action in January 1995. [internal citations omitted] [emphasis added].

Here, it is unclear what actually occurred on September 15, 2021, as other than arguing generally that he "realized" on that day the cause of his symptoms, plaintiff does not provide any details as to how such realization took place on that date. In any event, it is clear on this record that plaintiff began to experience the symptoms of his injuries as early as August 6, 2021, and by August 12, 2021, he was symptomatic enough to go to the emergency room. Either date would mean the plaintiff's Complaint was filed beyond the applicable SOL.

[5] Although toxic tort cases generally have a 3 year SOL, it is undisputed that the SOL for claims against municipal entities is 1 year and 90 days.

Further, plaintiff makes no arguments that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined at the time he first became symptomatic in August 2021. *See* Nonnon v City of New York, 32 AD3d 91 [1st Dept 2006]:

> The City argues that Angelilli's action is time-barred because his notice of claim was not filed until January 18, 1991, more than one year and 90 days after his 18th birthday on October 17, 1990. Angelilli responds that his complaint was timely filed pursuant to CPLR 214–c(4) within one year of his first learning that the landfill was the cause of his cancer. *However, he fails to allege, as required by that section, "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 [statute of limitations on October 17, 1990]."* As such, plaintiff Angelilli's complaint should be dismissed with leave to replead. [internal citations omitted] [emphasis added]).

Accordingly, the motion of the City defendants is granted.

With respect to plaintiff's motion to amend the NOC, it is academic. Plaintiff's proposed Amended NOC (NYSCEF Doc. No. 26) states, "The claim as against Respondents arose on or about April 29, 2021, and continuing through and including, September 15, 2021, and continuing thereafter […]." Even if this amendment were allowed, plaintiff's Complaint would still be untimely, as plaintiff does not dispute the timeline regarding the emergence of symptoms and his visit to the emergency room. The court further notes that it is unclear whether this request to amend was made in good faith, as other than saying that the incorrect date of accrual was listed in the NOC, plaintiff's counsel provides no explanation as to why this mistake was made in the first place.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion filed by SCA is closed as moot; and it is further

ORDERED that the cross-motion filed by the City is **GRANTED**, and plaintiff's Complaint is dismissed as against the New York City Department Of Education and The City Of New York; and it is further

ORDERED that the caption shall be amended to remove the New York City Department Of Education, The City Of New York and the New York School Construction Authority as named defendants in this action. The only remaining defendant is Cityarts Inc; and it is further

ORDERED that the cross-motion filed by plaintiff is **DENIED** as academic; and it is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

10/5/2023
DATE

J. MACHELLE SWETTING, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[X]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**