Rodgers v Long Is. R.R. Co.
2025 NY Slip Op 35324(U)
March 17, 2025
Supreme Court, Queens County
Docket Number: Index No. 718881/2020
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

FILED
3/25/2025
COUNTY CLERK
QUEENS COUNTY

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KENNETH J. RODGERS, IAS Part 20

Plaintiff, Index No.: 718881/2020

-against- Motion Date: 10.2.2024

LONG ISLAND RAILROAD COMPANY, Motion Seq. No.: 1

Defendants. Motion Cal. No.: 33

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The papers bearing NYSCEF Doc. Nos. 20-34 were read on the motion filed by the defendant, Long Island Railroad Company (the "Defendant"), for summary judgment.

The plaintiff, Kenneth J. Rodgers (the "Plaintiff"), commenced this cause against the Defendant, his former employer, pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 50, *et seq.*, contending that his workplace exposure to hazardous substances caused him to develop bladder cancer. Presently before the Court is the Defendant's motion, pursuant to CPLR §3212, for summary judgment motion dismissing the complaint. The Defendant argues that this cause is time-barred. For the following reasons, the motion is granted.

I. Factual Background

The Plaintiff was employed by the Defendant from 1970-2002. He worked as a machinist at various facilities operated by the Defendant. The Plaintiff's duties "varied from installing track equipment, fueling snow blowers, refueling locomotives, repairing locomotives, cleaning rail greasers, working with diesel equipment, replacing ties, working inside and outside of locomotives and freight cars, used weed sprayers and working on tracks and engines" (*see* NYSCEF Doc. No. 27, the Plaintiff's verified bill of particulars, p. 1, ¶ 1 d.).

The Plaintiff alleges that he: "was exposed to diesel fumes, welding fumes, chemical solvents, creosote, and benzene … worked in and around diesel fumes throughout the day … [and] was exposed to welding fumes by being in proximity to welding work while at LIRR facilities" (*see* NYSCEF Doc. No. 33, the Plaintiff's memorandum of law at pp. 1-2.

The Plaintiff was diagnosed with bladder cancer in February 2017.

The Plaintiff has admitted that in February 2017 he began to assume that his cancer might be related to his employment with the Defendant. Here, the Plaintiff testified as follows at his deposition:

> Q. So then just to confirm, the date of diagnosis [of bladder cancer]was at its latest February 27th of 2017?
>
> A. Yeah, I would say …
> Q. This research you conducted when you were first diagnosed [with bladder cancer], was that on the internet?
>
> A. Yes.
>
> Q. What did you do?
>
> A. Basically I looked under cancers -- railroad employee cancers …
>
> A. Basically I looked for causes of cancers in railroad workers because the site I looked at, it was titled as, Cancers of Railroad Workers [] and one of them was bladder.
>
> Q. And did you at that time come to believe that your cancer could have been caused by your work on the railroad?
>
> . . .
>
> A. Because I've never had any kind of cancers I assumed that maybe this was caused by my work.
>
> Q. Okay. And that was when you were first diagnosed on February 27th of 2017?
>
> . . .
>
> A. It was actually diagnosed when they saw the tumor initially. I didn't know what it was, so that was around the beginning of February, and that's when I started to assume that maybe it's a cancer.
>
> Q. And did you at that point start to assume it might be related your work on the railroad?
>
> A. Yes.
>
> Q. And just for clarity, you said beginning of February. That's February of 2017?
>
> A. That's correct.
>
> (*see* NYSCEF Doc. No. 26, p. 25, lns. 17-19; p. 26 ln. 9-p. 29 ln. 13).

This cause was commenced on October 16, 2020.

II. Discussion

Under FELA, no action shall be maintained unless commenced within three years from the date the cause of action accrued (*see* 45 USC § 56). Compliance with 45 USC § 56 is a condition precedent to an injured employee's recovery in a FELA action (*see Emmons v Southern Pacific Transportation Company*, 701 F2d 1112 [5th Cir 1983]). The failure to bring suit in a timely manner bars the claimant's recovery and negates the employer's liability (*see id.*) The Plaintiff has the burden of alleging and proving that his or her cause of action was commenced within the three-year period (*Matson v. Burlington Northern Santa Fe Railroad*, 240 F3d 1233 [10th Cir 2001]).

The issue before this Court is when the statute of limitations accrued. In *Lechowicz v Consolidated Rail Corp.*, 190 AD2d 998, 998-999 [4th Dept 1993], it was held as follows with respect to accrual:

> Accrual is defined for Statute of Limitations purposes in terms of two components, the injury and its cause. In cases involving latent occupational diseases whose specific date of injury cannot be determined because the injury results from continual exposure to a harmful condition over a period of time, a plaintiff's cause of action accrues when a reasonable person knows or in the exercise of reasonable diligence should know of both the injury and its governing cause. The rule imposes on an injured plaintiff an affirmative duty to investigate the potential cause of his injury upon experiencing symptoms or once the injury manifests itself. [T]o allow a plaintiff to unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury would thwart the legislative intent of 45 U.S.C. § 56 [internal quotation marks and citations omitted].

In *White v Union Pacific Railroad Company*, 867 F3d 997, 1001 [8th Cir 2017], the Court explained that with respect to cases involving latent injuries with symptoms that appear over time: "... the cause of action does not accrue until the employee is aware or should be aware of his condition. In addition to knowing of his condition, the employee must also know—or have reason to know—the condition's cause. Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause [internal quotation marks and citations omitted]."

In *White*, *id.*, at 1003, the trial court's grant of summary judgment dismissing the action was affirmed because "…a claim accrues when one reasonably should know that his symptoms are fairly attributable to a workplace injury. The district court correctly concluded, as a matter of law, that White's symptoms were serious enough in 2007 and 2008 to raise a duty to investigate. Because White did not investigate and file suit within three years of the accrual of his claim, the claim is time-barred."

Here, it is undisputed that the Plaintiff became aware of his injury, at the latest, in February 2017, which is when he was diagnosed with bladder cancer. The gravity of this condition triggered

the Plaintiff's duty to investigate the potential cause of the subject injury (*see Lechowicz v Consolidated Rail Corp.*, 190 AD2d 998; *White v Union Pacific Railroad Company*, 867 F3d 997). The Plaintiff did, in fact, do so by researching potential causes of his bladder cancer. Here, he conducted internet research. The Plaintiff admitted at his deposition that he began to assume in February 2017 that his cancer was caused as the result of his employment with the Defendant. As noted, this cause was commenced on October 20, 2020, three years and seven months after: (1) his cancer diagnosis; and (2) when he began to assume that the cancer was linked to his employment with the Defendant. This cause is thus time-barred (*see White v Union Pacific Railroad Company*, 867 F3d 997).

Furthermore, the Plaintiff knew or should have known that a potential cause of the cancer was his exposure while employed with the Defendant to welding fumes, diesel fumes, solvents, benzene and creosote. Here, the Plaintiff "knew about his cancer, and knew about the chemicals and hazards to which he had been exposed to over the years," at the latest, in February 2017, which is when he was diagnosed with bladder cancer (*see White v BNSF Railway Company*, US Dist Ct, NE, 4:17-CV-3062, Gerrard, J., 2018); *see also Loser v Long Island Rail Road Company*, 77 Misc 3d 1215 [A], 2022 NY Slip Op 51282[U] [Sup Ct, Queens County 2022]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendant's motion for summary judgment is granted and that the Plaintiff's complaint is dismissed; and it is further,

ORDERED, that the Defendant shall serve a copy of this Order with Notice of Entry on the Plaintiff via NYSCEF by April 17, 2025.

The Clerk of the Court is directed to: (1) mark this cause dismissed; (2) close all motions; and (3) close all appearances.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
March 17, 2025

MOJGAN C. LANCMAN, J.S.C.