

Pawlowski v Avon Prods., Inc.

Supreme Court of New York, New York County

September 25, 2024, Decided

INDEX NO. 190143/2021

Reporter

2024 N.Y. Misc. LEXIS 8302 *; 2024 NY Slip Op 33454(U) **

[1]** VICTORIA PAWLOWSKI, ADAM PAWLOWSKI, Plaintiff, - v - AVON PRODUCTS, INC., ESTEE LAUDER INC., ESTEE LAUDER INTERNATIONAL, INC., L'OREAL USA, INC, MAYBELLINE LLC, THE ESTEE LAUDER COMPANIES INC., CONOPCO, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CHESEBROUGH-POND'S, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ELIZABETH ARDEN, INC., ELIZABETH ARDEN, INC., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

mesothelioma, limitations period, nodule, toll, motion to dismiss, diagnosis, discovery, limitations, malignant

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 64, 65, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 131 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that defendants' Estee Lauder, Inc., Estee Lauder International, Inc., and The Estee Lauder Companies

Inc.'s (together, "Estee Lauder") motion to dismiss the complaint is denied for the reasons set forth below.

In this action, Estee Lauder moves to dismiss the complaint as against it pursuant to [CPLR 3211\(a\)\(5\)](#), alleging that the filing of the initial complaint was untimely and is subject to dismissal on statute of limitations grounds.

Plaintiffs filed a complaint on July 22, 2021 alleging that **asbestos** exposure caused Victoria Pawlowski's (Ms. Pawlowski) peritoneal malignant mesothelioma. Moving defendants allege that Ms. Pawlowski learned about her disease on November 16, 2017 when she underwent laparoscopic surgery due to an ectopic pregnancy and a nodule was removed from her **[**2]** peritoneum. **[*2]** See Memorandum of Law in Support of Motion to Dismiss Pursuant to [CPLR §3211\(a\)\(5\)](#) by Defendants, Estee Lauder, Inc., Estee Lauder International, Inc., and The Estee Lauder Companies, Inc., p. 3. Alternatively, moving defendants allege that Ms. Pawlowski was undoubtedly aware of her disease in January or February 2018, based on various doctors' reports. *Id.* at 3-4. In addition, moving defendants allege that the tolling of the statute of limitations in response to the COVID-19 pandemic does not apply. In opposition, plaintiffs argue that there was no medical consensus that Ms. Pawlowski had peritoneal malignant mesothelioma until February 2019. See Plaintiff's Opposition to Defendants' Motion to Dismiss Pursuant to [CPLR 3211\(a\)\(5\)](#) and Joinders Therein, p. 6. At the very least, plaintiffs allege that there was no medical clarity on Ms. Pawlowski's condition until November 2018. *Id.* at 2. Plaintiffs further argue that the Executive Orders did, in fact, toll plaintiff's claims. *Id.* at 15-16.

[CPLR 214](#)—c provides a three-year limitations period for actions to recover damages for personal injuries "caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body...". [CPLR 214-c\(2\)](#). **[*3]** The limitations period for such claims begins to run 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\(2\)](#). "Discovery of the injury" occurs "when the injured party discovers the primary condition on which the claim is based." [Matter of New York County DES Litig., Wetherill v Eli Lilly & Co., 89 NY2d 506, 509 \(1997\)](#). In other words, the limitations period begins to run from "the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced". [Id. at 514](#). However, exceptions exist where a plaintiff's symptoms are "too isolated or inconsequential to trigger the running of the Statute of **[**3]** Limitations under [CPLR 214—c\(2\)](#)". [Id. n. 4](#); see [In re New York City Asbestos Litig., Feinberg v Colgate-Palmolive Co., et. al., 53 Misc 3d 579, 582 \(Sup Ct 2016\)](#).

Moving defendants argue that the nodule is the primary condition on which Ms. Pawlowski's **asbestos** exposure claim is based such that the statute of limitations began to run on November 16, 2017 when it was removed. See Memorandum of Law in Support, *supra*, p. 3. As such, defendants argue the limitations period expired in November 2020. [Id. at 4](#). At the very latest, defendants argue that the limitations period began to run in January 2018 after Ms. Pawlowski received a peritoneal **[*4]** mesothelioma diagnosis from oncologist Dr. JD Eaton and obstetrician and gynecologist Dr. Andrea Morris and expired in January 2021. [Id. at 3-4](#). Moving defendants further argue that the tolling period pursuant to Executive Order 202.8 signed by then-governor Andrew Cuomo on March 20, 2020, does not apply to plaintiffs because plaintiffs' counsel continued to file other **asbestos** cases during that time, including other actions against Estee Lauder. [Id. at 11-12](#). However, moving defendants fail to offer any legal support for this assertion. [Id. at 14-15](#).

In opposition, plaintiffs argue that malignant mesothelioma is the primary condition on which Ms. Pawlowski's **asbestos** exposure claim is based, and it was not discovered until February 2019, or at the earliest, November 2018. See Plaintiffs Opposition, *supra*, p. 10-11. They argue that the November 2017 discovery of the nodule was too isolated and inconsequential to trigger the running of the statute of limitations because Ms. Pawlowski's mesothelioma was not actually discovered at that time, nor did she have any symptoms. [Id. at 11](#). In support, they offer her histology record from University Hospitals of Morecambe Bay from November 2017, in which her treating **[*5]** physician offers several possible

diagnoses, such as a "florid adenomatoid tumour or some form of trophoblastic proliferation" and suggests that Ms. **[**4]** Pawlowski seek further opinions. Plaintiffs' Opposition, *supra*, Exh. 1, University Hospitals of Morecambe Bay, Histology Record, dated November 16, 2017, p. 284. In further support, plaintiffs offer Ms. Pawlowski's deposition testimony in which she states that her next appointment was not until January 2018, at which time doctors informed her of her possible mesothelioma diagnosis, but that they were sending the nodule out for further testing. See Plaintiff's Opposition, *supra*, Exh. 2, Victoria Pawlowski's Deposition Transcript, p. 140: 14-25.

Plaintiffs further argue that the various pathologist reports from early 2018 indicate that Ms. Pawlowski's disease was likely some form of mesothelial cell proliferation, and in March 2018, the Regional Mesothelioma Multi-Disciplinary Team at the University of South Manchester concluded that there was "[n]o sufficient evidence to conclude malignant aggressive mesothelioma", and the diagnosis was "[b]enign". See Plaintiff's Opposition, *supra*, Exh. 6, University Hospital of South Manchester Foundation **[*6]** Trust, Regional Mesothelioma MDT Record, dated Mar. 1, 2018, p. 2. Ms. Pawlowski underwent another scan in August 2018 which revealed a new nodule that was later removed in October 2018. See Plaintiff's Opposition, *supra* at 5. Plaintiffs argue that was not until November 9, 2018, Ms. Pawlowski was informed she may have malignant mesothelioma, a diagnosis that plaintiffs assert was not "definitive" until February 21, 2019. [Id. at 19](#).

The Court finds that moving defendants' argument that tolling the "time limit for the commencement, filing, or service of any legal action" pursuant to Executive Order 202.8 (and the nine subsequent executive orders extending the toll) should not apply is meritless, as courts have upheld the applicability of the tolling period. See [Murphy v Harris, 210 AD3d 410, 411 \(1st Dept 2022\)](#); [Baldi v Rocky Point Union Free School Dist., 2022 NY Slip Op 30891\[U\], 2 \(N.Y. Sup Ct, New York County Mar. 17, 2022\)](#). "A toll suspends the running of the applicable period **[**5]** of limitation for a finite time period, and [t]he period of the toll is excluded from the calculation of the [relevant time period]". [Brash v Richards, 195 AD3d 582, 582 \(2d Dept 2021\)](#) (internal citations omitted). The toll ended when Executive Order 202.67 was signed on November 3, 2020. As the tolling period applies, an additional 228 is added to the end of the limitations period for plaintiffs to bring their claims.

With respect to the start of the limitations **[*7]** period,

the Court finds that it began to run in January 2018, the time at which Ms. Pawlowski was first informed of her mesothelioma diagnosis. The primary condition on which her claim is based is her mesothelioma diagnosis, not the mere discovery and removal of a nodule. Moreover, plaintiffs correctly argue that the scant discovery of her nodule in November 2017 is too isolated and inconsequential to trigger the start of the limitations period because it was unknown exactly what the nodule was, and "the time at which the statute was intended to start the clock is when plaintiff can ascertain the cause of the injury, and not just a display of the symptoms." *Baldi v Rocky Point Union Free School Dist., supra*. The Court also notes that prior to the discovery of the nodule, Ms. Pawlowski was asymptomatic.

In addition, Ms. Pawlowski testified that her first doctor's appointment after the nodule was removed was in January of 2018. See Plaintiff's Opposition to Defendants' Motion to Dismiss, Exh. 2, Victoria Pawlowski's Deposition Transcript p. 140:12-21. Defendant's submissions of Dr. Morris' January 12, 2018 report and Dr. Eaton's reports dated January 30, 2018 conclusively establish that **[*8]** she was informed of her diagnoses of mesothelioma. See Memorandum of Law in Support of Motion to Dismiss, Exhs. G, H, I. Defendants also recognize in their moving papers that January 2018 was the earliest date that Ms. Pawlowski was informed **[**6]** of her diagnosis because they state that the "deadline" for her to file was January 10, 2021. See Memorandum of Law in Support of Motion to Dismiss, p. 12. n. 4.

Thus, Ms. Pawlowski reasonably discovered her injuries on January 10, 2018, at which time the statute of limitations began to run and would have expired on January 10, 2021. However, upon adding the additional 228 to the end of the limitations period, Ms. Pawlowski's deadline to file her complaint was August 26, 2021. As plaintiffs' complaint was filed on July 22, 2021, it is deemed timely.

Accordingly, it is hereby

ORDERED that defendants Estee Lauder Inc., Estee Lauder International, Inc., and The Estee Lauder Companies Inc.'s motion to dismiss pursuant to [CPLR 3211\(a\)\(5\)](#) is denied in its' entirety, and it is further

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

This constitutes the Decision/Order of the Court.

9/25/2024 [*9]

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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