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Carol E. Higbee, P.J.Cv.

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SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, P.J.Cv.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE:	**In re Bristol-Myers Squibb Environmental Contamination Litigation**
DOCKET #:	**Case No. 281**
DATE:	**January 28, 2009**
MOTION:	**Motion to Dismiss Plaintiff's Wrongful Death Act Claims**
ATTORNEYS:	**Michael A. Tanenbaum, Marina Hoppas - Defendants** **Thomas D. Flinn - Plaintiffs**

Having carefully reviewed the papers submitted and any response received, I have ruled on the above Motion as follows:

BACKGROUND

Plaintiffs are current or former residents of New Brunswick in the neighborhood surrounding the Bristol-Myers Squibb Company ("Bristol-Myers" or "defendant") pharmaceutical research center (the "site"). Plaintiffs allege in their complaint that, beginning in 1905, the defendant released varying toxic or hazardous substances from the site, resulting in contamination of and injury to the plaintiff's property and bodies. The substances released include arsenic, mercury, vinyl chloride, and asbestos. These substances were inhaled or

ingested through contaminated air, soil, and water that spread from the site. Plaintiffs allege that the defendant did not take appropriate remediation measures and did not warn the residents of New Brunswick. Plaintiffs bring a survivorship claim and a claim under the Wrongful Death Act ("WDA"), among others.

At this stage of the litigation, the Court has before it only the complaints and answers of the parties. Discovery is in its very beginning stages. The instant motion to dismiss does not deal with the individual circumstances of the plaintiffs. Rather, the defendants assert that, on the face of the pleadings alone, the wrongful death claims must be dismissed because the claims were not filed within two years of the date of death. The plaintiffs assert in response that the motion is premature, because equitable principles can toll a wrongful death action and because the individual circumstances of the plaintiffs will be relevant in considering the application of the statute of limitations. Plaintiffs rely on the application of the discovery rule to make the complaints timely, alleging that Bristol-Myers concealed the contamination from the plaintiffs. Because equitable principles can apply in certain instances to toll a wrongful death action, the Court denies the instant motion to dismiss without prejudice.

STANDARD OF REVIEW

The defense of "failure to state a claim upon which relief may be granted" includes "the bar of the statute of limitations" when it "appears on the face of the complaint." R. 4:6-2; Rappeport v. Flitcroft, 90 N.J. Super. 578, 580-581 (App. Div. 1966). To determine the adequacy of a pleading:

> a reviewing court [must] search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the Court is not concerned with the ability of the plaintiffs to prove the allegation contained in the complaint. For the purpose of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be

> one that is at once painstaking and undertaken with a generous and hospitable approach.
>
> Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (internal citations omitted).

With these requirements in mind, the Court considers the arguments of the parties.

DISCUSSION

Under the WDA, a wrongful death action can be brought "when the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury...." N.J.S.A. 2A:31-1. However, a wrongful death action that is not premised on "murder, aggravated manslaughter or manslaughter for which the defendant has been convicted" must be filed within two years of date of the death of the decedent. N.J.S.A. 2A:31-3. Additionally, under N.J.S.A. 2A:15-3, a survivorship claim can be brought by an executor or administrator if "death resulted from injuries for which the deceased would have had a cause of action if he had lived...." A survivorship action "shall be commenced within two years next after the cause of action shall have accrued...." N.J.S.A. 2A:14-2.

The discovery rule is generally applicable to statutes of limitations. The discovery rule states that "when a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or facts suggesting the fault of another person." Tevis v. Tevis, 79 N.J. 422, 432 (1979). In other words, it allows for tolling of the statute of limitations until "the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, [but] not when a lawyer advises her that the facts give rise to a legal cause of action." Baird v. American Medical Optics, 155 N.J. 54, 68 (1998).

The discovery rule does apply to the statute of limitations period for a survivorship claim. See Lafage v. Jani, 166 N.J. 412, 420 (2001). Accordingly, it would not be appropriate to dismiss these claims at this juncture, without a consideration of the facts applicable to each plaintiff. Defendant asserts, however, that the discovery rule does not apply to a wrongful death action. The defendants primarily draw support for this argument from Presslaff v. Robins. 168 N.J. Super. 543 (App. Div. 1979). The Presslaff court declined to apply the discovery rule to the WDA. It rested this determination on whether the statute was an "accrual" category of limitations. An accrual statute is one that requires the action to be brought, for example, "'within 2 years next after the cause of any such action shall have accrued,'" rather then from a specific, objective point in time. Id. at 546. The WDA was held not to be an accrual statute, because it ran from a specific date—the date of death. The court declared that "it is settled law in this State that the discovery principle is not applicable except in relation to an accrual period of limitations."[1] Id. at 546.

The plaintiffs rely on later decisions of the New Jersey Supreme Court to argue that Presslaff is no longer binding on this Court. In Negron v. Llarena, the New Jersey Supreme Court applied the doctrine of substantial compliance to toll the WDA limitations period. 156 N.J. 296 (1998). The Court characterized the WDA limitations period as a substantive statute of limitations, and not a procedural statute. Id. at 300. "A substantive statute of limitations, as a condition precedent to bringing suit, bars not only the remedy, but also the right itself," and is construed strictly. Ibid. Procedural statutes, on the other hand, are subject to equitable principles. Ibid. Despite this characterization, the Court recognized that substantive statutes of

[1] See e.g., Brookins v. Murray, 131 N.J. 141, 154 (1993) (stating that application of the discovery rule to the statute governing the Unsatisified Claim and Judgment Fund, which "runs from a fixed, specified event, would be inconsistent with our previous rulings on statutes of limitations"); Bonner Properties, Inc., v. Planning Board of Franklin, 189 N.J. Super. 553, 563-564 (Law Div. 1982) (stating that the discovery rule does not apply where the purpose is based upon a fixed objective event, and is "particularly inapplicable where the purpose of the objective event named in the statute is to obviate claims of justifiable ignorance").

limitation have been more liberally interpreted over time. Id. at 302. Specifically, in a 1978 decision, White v. Violent Crimes Compensation Board, the Court allowed a substantive limitation period to be tolled "in a particular set of circumstances if the legislative purpose underlying the statutory scheme will thereby by effectuated." 76 N.J. 368, 379 (1978). Therefore, "this Court's approach to substantive statutes of limitations has evolved to one that recognizes their application depends on statutory interpretation focusing on legislative intent and purpose." Negron, supra, 156 N.J. at 304. Applying this concept to the WDA, the Court found "'there is nothing reflective in the objectives of [the Act] or its history that suggests the Legislature intended to foreclose the familiar doctrine of substantial compliance in the [statutes of limitations] context.'" Id. at 305.

In Lafage v. Jani, the trial court held that the discovery rule applied to a WDA action after applying the holding of Negron. Supra, 166 N.J. at 418. However, the trial court still found the action to be time-barred, because the statute of limitations began to run on March 22, 1995 and the action was not filed until April 7, 1997. Id. at 418. On appeal, the Supreme Court "decline[d] to address the broader question [of] whether the discovery rule generally should be applicable to Wrongful Death Act claims," because even if it applied, the cause of action would still not be timely. Id. at 421.

Although the Supreme Court declined to apply the discovery rule, the Court did discuss the WDA statute of limitations extensively, in the context of infancy tolling. The Court noted that the distinction between a procedural and substantive statute of limitation: a substantive statute creates a cause of action that does not exist under the common law, and a procedural

statute applies a common law cause of action. Id. at 422. Therefore, only procedural statutes are "subject to equitable principles."[2] Ibid.

After its review of the historical application of infancy tolling, the Supreme Court also discussed in general the common law basis for the WDA. The Court conducted an extensive examination of English common law and ultimately found that there was indeed a common law basis for a wrongful death action. Id. at 433-434. The Court therefore reversed the Negron and White characterization of the WDA statute of limitations as being a substantive statute, without a basis in the common law. Rather, "our Wrongful Death Act is a codification of our common law. The practical effect of recognizing a common law wrongful death claim is that it provides *an independent basis on which to allow equitable tolling of the Wrongful Death Act*." Id. at 434 (emphasis added). Further, the Court stated that "our earlier judicial conclusion that New Jersey did not have a wrongful death cause of action at common law found its way into the law through misconception" and that "this was historical error of grave proportion." Id. at 439-440. Lafage therefore clearly and firmly recognizes that the WDA can be equitably tolled.

The defendants assert that, although Presslaff preceded Lafage, Presslaff did not base its decision on the distinction between substantive and procedural statutes of limitations and therefore was not overruled by Lafage. Presslaff's holding that the discovery rule does not apply to the WDA statute of limitations was indeed not directly overruled by Lafage, although the language in the case suggests the Supreme Court may be inclined to make that ruling the future. Lafage nevertheless clearly stated that the WDA can be equitably tolled in certain instances.

Equitable tolling recognizes that the statute of limitations defense should not be pursued as a "sword" when an adversary's "misconduct prevents a claimant from filing within the

[2] However, the Court found that "[e]ven substantive statutes...need not necessarily be construed rigidly." Id. at 422.

limitation period." Freeman v. State of New Jersey, 347 N.J. Super. 11, 31 (App. Div. 2002). Therefore, a "defendant's conduct is relevant to the availability of a statute of limitations defense." Zaccardi v. Becker, 88 N.J. 245, 257 (1982). Equitable tolling has generally been applied when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[3] Freeman, supra, 347 N.J. Super. at 31.

Although there is no evidence at present that the defendant affirmatively tricked or mislead the plaintiffs, the doctrine of equitable tolling has been extended beyond these boundaries. In R.A.C. v. P.J.S., Jr., the New Jersey Supreme Court affirmed the Appellate Division's finding that "in limited circumstances, ... equitable tolling might apply even if the defendant does not take affirmative steps to prevent a plaintiff from filing a cause of action." 192 N.J. 81, 103 n.11 (2007).

The Appellate Division has allowed the WDA to be equitably tolled when a murderer escaped detection until long after the statute of limitations had run. Bernoskie, supra, 344 N.J. Super. at 166. In Dunn v. Borough of Mountainside, the Appellate Division allowed the WDA to be equitably tolled when a police officer did not report his sexual assault against the plaintiff. 301 N.J. Super. 262, 278 (App. Div. 1997). In that case, the police officer had a "duty to disclose his sexual assault on plaintiff," but did not. Ibid. Because the defendant behaved "in such a way to prevent plaintiff from ascertaining his identity," "[a]llowing the plaintiff to pursue her claims properly balance[d] the equities presented under the circumstances." Id. at 280-281.

[3]Additionally, although not likely to be applicable here, equitable tolling has been allowed when a plaintiff has been prevented "in some extraordinary way" "from asserting his rights." Freeman, supra, 347 N.J. Super. at 31 (quoting U.S. v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)). "Finally, equitable tolling may be appropriate where a plaintiff has timely asserted his rights mistakenly by either defective pleading or in the wrong forum." Freeman, supra, 347 N.J. Super. at 31.

In both Bernoskie and Dunn, the Appellate Division considered the legislative purpose of the statute of limitations and the equitable claims of the parties in evaluating whether the limitations period should be tolled. Bernoskie, supra, 344 N.J. Super. at 167-168; Dunn, supra, 301 N.J. Super. at 279. This approach was supported by the New Jersey Supreme Court in Galligan v. Westfield Centre School, which stated: "[a] 'just accommodation' of individual justice and public policy requires that in each case the equitable claims of opposing parties must be identified, evaluated, and weighed. Whenever dismissal would not further the Legislature's objectives in prescribing the limitation, the plaintiff should be given an opportunity to assert [her] claim." 82 N.J. 188, 192-193 (1980) (citation omitted). This approach is also consistent with other New Jersey decisions. See Tevis, supra, 79 N.J. at 433 (stating "it would be remiss of the court to apply strictly and uncritically a statutory period of limitations without conscientious consideration of the circumstances of the individual cases"); Freeman, 347 N.J. Super. at 31 (stating the doctrine of equitable tolling should be used "where it is demanded by sound legal principles as well as the interests of justice"); Negron, supra, 156 N.J. at 304 (stating that "courts look[ ] beyond the form of the limitations period, that is, whether it [is] 'substantive' or 'procedural,' to determine whether tolling of the limitations period would effectuate the legislative purpose of the statute").

It is possible that, in line with this precedent, the statute of limitations in this matter could be equitably tolled. The Court cannot find at this point in time that there are sufficient facts to support this result. If the plaintiffs are correct in their allegation that the defendants failed to disclose the extent of the contamination, it is plausible that this could present a ground for equitable tolling. Further, the purpose of a limitations period is, generally, "to protect defendants from unexpected enforcement of stale claims by plaintiffs who fail to use reasonable diligence in prosecuting their claims." Lafage, supra, 166 N.J. at 423. Therefore, the statute of limitations

would not be offended here if the statute was tolled due to the defendant's withholding of information about the contamination, as the plaintiffs assert. However, it is too early in the litigation to know if the limitations period should be tolled on these grounds, or any other grounds, since little in the way of a factual background exists to give a context to the claims. Since the law on the discovery rule in WDA is somewhat unclear at this time, before a final ruling is made by the court on the discovery rule, a record should be created as to what facts exist to support this exception to the statute of limitations. This motion will be more appropriately decided after discovery has produced an account of Bristol-Myers actions during the period in question. Accordingly, the Court denies the instant motion to dismiss without prejudice.

CAROL E. HIGBEE, P.J.Cv.