Control No. 18100319

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Donald Kirkwood	:	
Plaintiff	:	March Term, 2017
	:	
vs.	:	No. 3604
	:	
Norfolk Southern Railway Company,	:	
Consolidated Rail Corporation, and	:	
Penn Central Corporation f/k/a American	:	
Premier Underwriters, Inc.	:	
Defendants	:	

ORDER

And Now, this 26nd day of November, 2018, upon consideration of Defendants' Consolidated Rail Corporation, Norfolk Southern Railway Company and Penn Central Corporation f/k/a American Premier Underwriters, Inc.'s Motion for Summary Judgment, including the Reply Memorandum and Plaintiff's Response in Opposition thereto, and for the reasons set forth in Court Exhibit "A", attached hereto, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **DENIED in its entirety**.

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.

Kirkwood Vs Consolidate-ORDER

17030360400109

Court Exhibit "A"

The issue presented in this Motion for Summary Judgment is whether this Court can determine as a matter of law that Plaintiff-Kirkwood failed to file his lawsuit in a timely manner. Defendant-Railroads contend that the statute of limitations period commenced in May, 2014, when Mr. Kirkwood's biopsy for lung cancer was confirmed. The Plaintiff assert that the limitations period was tolled until October, 2016, when Mr. Kirkwood first contacted his attorneys.

When considering this motion, all facts of record and reasonable inferences must be resolved against the moving party. Rule 1035.2(1). It is not appropriate for this Court to determine what the facts are, but rather to determine whether there are genuine issues of fact.

The Pennsylvania Supreme Court recently provided a comprehensive analysis of when summary judgment should be granted when Defendants' challenge is grounded upon an alleged failure to file a lawsuit in a timely manner. In Nicolaou v. Martin, ___ A.3d ___, 2018 WL 5019804 (Pa. 2018), summary judgment was reversed. The Court held that the determination of when a Plaintiff should reasonably be aware of her injury and that the injury could have been caused by Defendants' negligence are generally an issue of fact to be determined by a jury. In Nicolaou, supra, more than 10 years passed from the time Plaintiff was bitten by a tick on her ankle and the filing of her complaint.

In Nicolaou, supra, the Defendants argued that when Ms. Nicolaou received a "probable diagnosis" of Lyme disease, the Plaintiff knew or should have known that her injuries could have been caused by Defendants' negligence. Plaintiff-Nicolaou argued that until she received a positive test result, she neither knew nor could have known. The Supreme Court relied on well-settled Pennsylvania jurisprudence and held that if reasonable minds could differ regarding whether the injury or cause was ascertainable through the exercise of reasonable diligence, the entry of summary judgment is not appropriate. In Nicolaou, supra at: _____:

> "The running of the statute of limitations is not tolled by mistake, misunderstanding, or lack of knowledge. . . .
>
> Acting as an exception to this general rule, however, is the discovery rule, which originated in cases where the plaintiff's injury or its cause was neither known nor reasonably ascertainable." (citations omitted).

The Supreme Court held that: the factual issue pertaining to Plaintiff's notice and diligence are for a jury to decide.

In the case at bar, the records submitted in support of Defendants' motion are thin. That is, while Mr. Kirkwood did receive his confirming diagnosis of lung cancer in May, 2014, the physician's Social History note does not confirm a diagnosis of asbestos related lung cancer. Nor do the medical records indicate facts to show that a doctor told him that the lung cancer might be work related. Rather, the medical documents list several possibilities for the cause of Plaintiff's injuries including smoking and second hand smoke.

At deposition held, June 22, 2018, Mr. Kirkwood did not recall discussing work exposures with his physician, however, he acknowledged that seeing so many of his friends "go down" made him consider the possibility that his lung cancer was caused by his railroad work but this was not certain.

Plaintiff's Complaint contends that from 1974 through 2006, while employed at Defendants' railroads, he was exposed to several carcinogens. Paragraph 7 states:

> "During the course of his railroad employment, Plaintiff was exposed to excessive and harmful amounts of chemicals and cancer causing substances, including diesel fumes/exhaust, welding fumes, solvents and/or asbestos while working as a machinist for the Defendants."

Clearly, there are conflicting expert reports relating to causation. See, Daley v. A.W. Chesterton, Inc., 971 A.2d 1258 (Pa. Superior Ct. 2009) which distinguishes squamous cell carcinoma from malignant mesothelioma due to asbestos exposure. Whether Mr. Kirkwood through the exercise of reasonable diligence should have ascertained that Defendants caused his injury prior to October, 2016 is a jury decision. See generally, Pa. SSCJI §18.01; Gleason v. Borough of Moosic, 15 A.3d 479 (Pa. 2011) (summary judgment reversed); Wilson v. El-Daieff, 964 A.2d 354 (Pa. 2009) (summary judgment reversed); Fine v. Checchio, 870 A.2d 850 (Pa. 2005) (summary judgment reversed); O'Kelly v. Dawson, 62 A.3d 414 (Pa. Superior Ct. 2013); Coleman v. Wyeth Pharmaceuticals, Inc., 6 A.3d 502 (Pa. Superior Ct. 2010) (summary judgment reversed); Drelles v. Manufacturers Life Ins., Co., 881 A.2d 882 (Pa. Superior Ct. 2005) (summary judgment reversed).

Finally, Rule 401(b)(2) states:

> "(2) A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint."

Each litigation must be considered on a case by case basis. There is nothing in this record to suggest that Plaintiff engaged in conduct serving to stall the legal machinery. Plaintiff filed his Complaint in March, 2017, reinstated it consistent with the Rules of Civil Procedure, then properly served the Defendants in July and August, 2017. Now, only 15 months later, the case is ready to be called for trial. This Court is unable to conclude that Plaintiff-Kirkwood abused the system of justice.