

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENNIS N. LARWETH,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Northern District of
v.	:	Illinois
	:	(Case No. 99-02189)
	:	
AC AND S, INC.	:	E.D. PA CIVIL ACTION NO.
et al.,	:	2:08-89914-ER
	:	
Defendants.	:	

FILED

MAR 14 2013

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **13th** day of **March, 2013**, it is hereby **ORDERED** that the Motion for Partial Summary Judgment of Defendant Georgia Pacific Corporation (Doc. No. 116) is **GRANTED**.¹

¹ This case was transferred in October of 2008 from the United States District Court for the Northern District of Illinois to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that he was exposed to asbestos and became ill as a result. Plaintiff alleges that he received diagnoses of pleural thickening and, later, lung cancer. Plaintiff first filed a complaint alleging pleural thickening in 1999. In April of 2004, he received a diagnosis of lung cancer. Plaintiff identified the lung cancer diagnosis in a filing made with the Court (and served upon defense counsel) during the discovery phase as part of Plaintiff's compliance with the Court's Administrative Order No. 12 ("A012").

Plaintiff has brought claims against various defendants. Defendant Georgia-Pacific Corporation ("Georgia Pacific") has moved for summary judgment arguing that Plaintiff's claims are barred by the Illinois statute of limitations. The parties agree that Illinois law applies to Plaintiff's claims.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

1. Procedural Matters (Federal Law)

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply federal law as interpreted by the Third Circuit Court of Appeals. Id.

2. Substantive Matters (State Law)

The parties have agreed that Illinois substantive law applies in these cases. Therefore, this Court will apply Illinois law in deciding Defendant's Motions for Summary Judgment in those cases. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Amendments to Pleadings (Federal Rules of Civil Procedure 15 and 16)

Amendments to pleadings are governed by Rules 15 and 16 of the Federal Rules of Civil Procedure. Rule 15 permits parties to amend their pleadings only once as a matter of course, within 21 days after service of the initial complaint or the filing of a responsive pleading/motion. Fed. R. Civ. P. 15(a)(1). All further amendments require the leave of the court which it should "freely give . . . when justice so requires." Id. R. 15(a)(2). If, however, a motion to amend is filed after the Court ordered deadline for amendments has passed, the moving party must demonstrate good cause for the amendment. Id. R. 16(b)(4). "Good cause" under Rule 16(b) focuses on the diligence of the party seeking the modification of the scheduling order. See Fed. R. Civ. P. 16, Advisory Committee Note (1983) ("the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension").

Once good cause is shown, a court may determine whether justice requires the amendment under Rule 15. A district court has discretion to deny such a request, "if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith, or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 116 (3d Cir. 2003). "In determining whether a claim would be futile, the district court applies the same standard of legal sufficiency as [it] applies under Federal Rule of Civil Procedure 12(b)(6)." Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 243 (3d Cir. 2010) (internal citations and quotations omitted).

D. Relation Back of Claims (Federal Rule of Civil Procedure 15)

Under Federal Rule of Civil Procedure 15(c)(1)(B), an amendment to a pleading relates back to the date of the original pleading where the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading. Glover v. FDIC, 698 F.3d 139, 145 (3d Cir. 2012). Relation back is structured to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. Id. (citing Krupski v. Costa Crociere S.p.A., --- U.S. ----, 130 S. Ct. 2485, 2494, 177 L.Ed.2d 48 (2010)). Where an amendment relates back, Rule 15(c) allows a plaintiff to sidestep an otherwise-applicable statute of limitations, thereby permitting resolution of a claim on the merits, as opposed to a technicality. Id. At the same time, Rule 15(c) endeavors to preserve the important policies served by the statute of limitations - most notably, protection against the prejudice of having to defend against a stale claim, as well as society's general interest in security and stability - by requiring that the already commenced action sufficiently embraces the amended claims. Id.

Application of Rule 15(c)(1)(B) normally entails a "search for a common core of operative facts in the two pleadings." Id. It is well-established that the touchstone for relation back is fair notice, because Rule 15(c) is premised on the theory that "a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." Id. at 146 (quoting Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 149 n.3, 104 S. Ct. 1723, 80 L.Ed.2d 196 (1984)). Thus, only where the opposing party is given "fair notice of the general fact situation and the legal theory upon which the amending party proceeds" will relation back be allowed. Id.

II. Defendant Georgia Pacific's Motion for Summary Judgment

A. Defendant's Arguments

Defendant Georgia Pacific argues that Plaintiff's claims are barred by the Illinois statute of limitations.

Specifically, Defendant argues that a recovery by Plaintiff for lung cancer is barred because (1) the complaint in this action contains only a claim for pleural thickening, (2) Illinois recognizes the "two disease rule" (also referred to as the "separate disease rule"), such that Plaintiff was required to amend the complaint to include a second, separate claim for lung cancer, and (3) more than two years passed after the time of the lung cancer diagnosis without the complaint being amended to include a claim for lung cancer within the two-year period provided for by the Illinois statute of limitations. In support of its assertion that Plaintiff was required to file a new and separate claim for lung cancer, Defendant relies upon VaSalle v. Celotex, 161 Ill. App. 3d 808, 812 (Ill. App. Ct. 1987).

B. Plaintiff's Arguments

In response to Defendant's argument, Plaintiff argues that a recovery for lung cancer is not precluded because (1) there is nothing that requires an amendment to the complaint to reflect the subsequent lung cancer diagnosis (as the claim set forth in Plaintiff's existing complaint encompasses a claim for lung cancer), and (2) even if there were such a requirement, Illinois law allow complaints to be amended freely and liberally (pursuant to § 735 ILCS 5/2-616 and related case law). Plaintiff contends that this amendment would be permitted under Illinois law under the circumstances at hand because Defendant had notice of the "updated" lung cancer diagnosis long ago (both when discovery responses were served and when disclosures were made pursuant to A012), such that Defendant cannot claim there was any surprise or accompanying prejudice to it at the summary judgment stage. Plaintiff contends that the discovery phase in this case was conducted based upon a lung cancer diagnosis. During oral argument, counsel for Plaintiff indicated that it was counsel's understanding that the A012 filings identifying Plaintiff's lung cancer diagnosis had the effect of amending the complaint to include a claim for lung cancer, such that there was no need for Plaintiff to file an amended complaint.

Plaintiff has submitted a proposed amended complaint, which specifies that Plaintiff is seeking a recovery based on the lung cancer diagnosis. Plaintiff cites to Tongate v. Wyeth Lab., 220 Ill. App. 3d 952 (1st Dist. 1991), cert. denied, 143 Ill.2d 649 (1992), which addresses § 735 ILCS 5/2-616 and which Plaintiff contends indicates that the factors for a court to weigh in deciding whether to allow an amended pleading include: (1) whether the proposed amendment would cure the defective

pleadings, (2) whether it would cause prejudice or surprise to the defendant, (3) the timeliness of the proposed amendments, and (4) whether any previous opportunity to amend the pleadings could have been identified.

C. Analysis

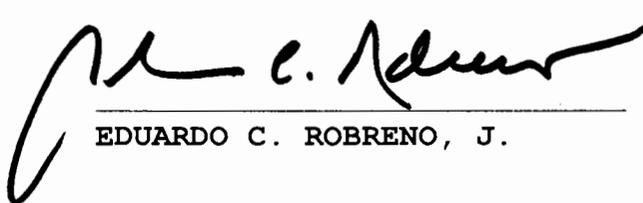
The parties agree that the statute of limitations applicable to Plaintiff's claims is two (2) years. See § 734 ILCS 5/13-202. The parties agree that Illinois recognizes the "two disease rule" (also referred to as the "separate disease rule"). See VaSalle v. Celotex, 161 Ill. App. 3d 808, 812 (Ill. App. Ct. 1987). The issues presented by Defendant's motion are (1) whether Plaintiff was required to amend the complaint to include a claim for lung cancer and, (2) if so, (a) whether Plaintiff is permitted to do so now (b) such that the lung cancer claim will relate back to the original claim and therefore is not barred by the statute of limitations.

This Court construes VaSalle to require Plaintiff to bring a claim for lung cancer that is separate from Plaintiff's claim for pleural thickening. Plaintiff concedes that no such claim has been brought in the existing complaint. Therefore, Plaintiff may only obtain a recovery based upon the lung cancer diagnosis (rather than a recovery based solely upon the diagnosis of pleural thickening), if (1) Plaintiff is now permitted to amend the complaint, and (2) the new claim in the amended complaint relates back to the original claim.

Because Plaintiff's motion to amend was not brought until the summary judgment phase of the case (i.e., after the Court ordered deadline for amendments passed), Plaintiff must demonstrate good cause for the amendment. Fed. R. Civ. P. 16(b)(4). Plaintiff contends that the reason the complaint was not amended prior to the deadline for amendments is that it was the understanding of counsel that, in light of the Court's A012 procedural requirements, no amendment was necessary because Defendant was notified of Plaintiff's lung cancer by way of the A012 disclosures. Plaintiff cites no authority from this Court (or elsewhere) to support this understanding. The Court has never indicated to counsel for Plaintiff (or any other party or counsel appearing in the MDL) that discharge of A012 obligations relieves a party of complying with the Federal Rules of Civil Procedure. The Court cannot conclude that the misunderstanding of counsel for Plaintiff constitutes "good cause" for failing to seek leave to amend the complaint in this action prior to the deadline for

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AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

doing so. Accordingly, Plaintiff's request to amend the complaint at this time is denied.

In light of this determination, the Court need not consider whether the interests of justice require allowing an amendment to the complaint or whether the proposed claim for lung cancer would relate back to the original claim such that it would be deemed timely.

Because there is no claim for lung cancer in the present action, Plaintiff may not recover for the diagnosis of lung cancer and is instead permitted only to pursue and recover for the existing claim for pleural thickening. Accordingly, the case will proceed toward trial based only that existing claim.