

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

EUFROSINA DIACONU ET AL.,

PLAINTIFFS,

v.

DEFENSE LOGISTICS ET AL.,

DEFENDANTS

CIVIL ACTION

No. 98-6533

MEMORANDUM/ORDER

March 27, 2007

Now before the court is Eufrosina Diaconu's "Motion for Reconsideration or in Alternate Motion for Permission to File a New Toxic Tort Claim." Diaconu's motion relates to *Diaconu et al. v. Defense Logistics et al.*, Civil Action No. 98-6533, a civil suit filed in 1998 by Diaconu and her co-plaintiff Dorothy Butler.¹ For the reasons given below, I will deny Diaconu's motion for reconsideration but allow Diaconu to file a new tort action on the basis of her recently-developed cancer. I will also vacate the order filed on January 8, 2007, Docket # 47, to the extent that it denied Butler's motion to reopen her portion of this case.

¹ Diaconu, but not Butler, is also a plaintiff in the similarly titled *Diaconu v. Defense Logistics et al.*, Civil Action No. 96-214 (an employment discrimination lawsuit).

I. Overview

On April 24, 2006, plaintiff Dorothy Butler filed a “motion to reopen” this civil action. The case, which had been on the docket of my late colleague Judge Weiner, was then transferred to my docket on April 25, 2006. Shortly thereafter, on May 5, 2006, Butler’s co-plaintiff Eufrosina Diaconu filed a motion to reopen her portion of the case.

In considering these motions, I observed that “[p]laintiffs, who are proceeding *pro se*, do not indicate under what authority they request relief from this court or, in fact, specify what relief they seek.” Docket # 47 at 2.² The docket report for the case set out the following procedural history: In December of 1998, Butler and Diaconu filed a complaint against defendants Defense Logistics Agency (DLA), Defense Personnel Supply Center Philadelphia (DPSC), the United States Secretary of Defense, the Environmental Protection Agency (EPA), the EPA Administrator, and the Director of the Office of Health, Safety, and the Environment. On April 2, 1999, Judge Weiner dismissed the complaint with prejudice, as time-barred, pursuant to Federal Rule of Civil Procedure 12(b)(6). Docket # 31. On May 3, 1999, Judge Weiner denied plaintiffs’ motion for reconsideration with prejudice. Docket # 35. In June of 1999, plaintiffs filed a

² Butler’s motion to reopen consisted of the statement that “I Dorothy S. Butler am requesting for the courts to plase [sic] reopen my case.” Docket # 42. Diaconu’s motion to reopen recited that Diaconu was diagnosed with uterine cancer in May of 2006; that “[s]ince th[is] case was filed, new evidences came to light which only support the existing direct evidences allready in the file, evidences that have been previously ignored by the U.S. district court”; and that “[s]ince th[is] case was filed, on the same ground as the instant case defendant has been found to be toxic-liabled to the Commonwealth of Pennsylvania and to the Philadelphia Housing.” Docket # 44.

notice of appeal. Docket # 37. On July 9, 2002, the Clerk of this Court docketed a judgment from the Third Circuit stating that “the judgment of the District court entered 4/2/99 be and the same is hereby affirmed in part and reversed and remanded in part.” On that same date, the Clerk also closed this case for statistical purposes. The Federal Appendix lists the judgment of April 2, 1999 as having been affirmed without a published opinion. 33 Fed. Appx. 647 (3d Cir. 2002).

On the basis of this procedural history, I understood plaintiffs—in their motions of April 24, 2006 and May 5, 2006—to be seeking “relief from the district court order dismissing their complaint.” Docket # 47 at 2. Thus, I “consider[ed] their motions in light of Federal Rule of Civil Procedure 60(b), which sets out the circumstances under which a court may grant relief from a judgment or order.” *Id.* Applying the standards of Rule 60(b)(2) (authorization to grant relief based on “newly discovered evidence”) and Rule 60(b)(6) (authorization to grant relief for “any other reason justifying relief from the operation of the judgment”), I concluded that plaintiffs could not obtain relief under either provision. *Id.* Accordingly, in a memorandum and order filed on January 8, 2007, I denied both motions. *Id.* at 5.

On January 16, 2007, Diaconu filed a “Motion for Reconsideration or in Alternate Motion for Permission to File a New Toxic Tort Claim.” Docket # 49. In this motion, Diaconu petitions the court to separate her motion from Butler’s on the grounds that Diaconu seeks “to reopen only her portion of the case,” while Butler seeks “relief based

on the fact that on appeal the [Third Circuit] remanded Butler’s portion of the case back to the trial court.” *Id.* at 1. Diaconu also asserts the timeliness of her May 5 motion to reopen, stating that she brought this motion “as soon as (i) she learned that she has cancer and (ii), as soon as she knew that the type of cancer she was diagnosed with . . . was caused by the ultrahazardous chemicals and materials she was exposed to while she worked for [defendants Defense Logistics Agency (DLA) and Defense Personnel Support Center (DPSC)] in Philadelphia.” *Id.* at 2. Finally—in the event that this court declines to reconsider its decision of January 8—Diaconu moves for “specific, clearly spelled out permission to file a new toxic tort case against all defendants” on the basis of “the cancer she was diagnosed with during the 2006 calendar year,” in order to “avoid the appearance of res [judicata].” *Id.*

On February 12, the government filed a response to plaintiff’s Motion for Reconsideration, Docket # 50, wherein it reproduces the Third Circuit’s unpublished opinion—the first such copy provided to this court. In this opinion, it appears that the Third Circuit concluded the following with respect to Butler’s claims:

Although Butler alleges that she was aware of some chemical exposure while working at DPSC, she could not have been aware of the specific injury; i.e., the cancer, until it was diagnosed in 1998. Thus, it appears that under Pennsylvania law, this claim is not time-barred, and we will remand to allow the District Court to consider the claim in the first instance.

Slip Op. 5. The Third Circuit further concluded that the claims brought by Diaconu in her 1998 complaint were time-barred. However, it also noted that

Although it is not clear from the submission; it appears that Diaconu may have developed symptoms and/or diseases that she was not aware of at the time the complaint was filed. We express no opinion as to whether a new complaint containing claims based on those symptoms would be barred under the discovery rule. *See Zieber[] v. Bogert*, 773 A.2d 758, 761 (Pa. 2001) (noting that Pennsylvania recognizes the “separate disease” rule for statute of limitations purposes in certain cases[]).

Id. at 5 n.4.

II. Discussion

A. Motion for Reconsideration

(1) Standard for Reconsideration

“Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.” *Continental Casualty Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995). As the Third Circuit has noted, “[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Thus,

[a]lthough federal courts always retain the discretion to reconsider issues already decided in the same proceeding, *see Deisler v. McCormack Aggregates Co.*, 54 F.3d 1074, 1086 n.20 (3d Cir. 1995); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4478 at 789-90, courts will reconsider an issue when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice. 18 Wright, Miller & Cooper, § 4478 at 790.

NL Industries, Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n.8. (3d Cir. 1995).

(2) This Court's Order of January 8, 2007

There has been no change in controlling law since this court denied plaintiffs' motions to reopen. Nor have plaintiffs presented the court with evidence that was "unavailable" or "unknown to [plaintiffs] at the time" they filed their motions. *DeLong Corp. v. Raymond Intern., Inc.*, 622 F.2d 1135, 1140 (3d Cir. 1980), *overruled on other grounds by Croker v. Boeing Co.*, 662 F.2d 975, 983 (3d Cir. 1981). However, there does seem to be a need to correct a clear error with respect to my disposition of Butler's motion. The Third Circuit, on appeal, determined that Butler's claims were not time-barred and remanded her portion of the case for further proceedings consistent with its opinion. This instruction has not, hitherto, been carried out due to the Clerk's Office's erroneous closure of this case, the unfortunate death of Judge Weiner, and Butler's inability—given her lack of sophistication and *pro se* status—to clearly articulate why her portion of the case should be reopened. Under these circumstances, reconsideration of my earlier decision seems necessary to prevent injustice to Butler. Accordingly, I will vacate the order filed on January 8 as it relates to Butler's motion to reopen.

I see no corresponding error or injustice with respect to my disposition of Diaconu's motion to reopen. The Third Circuit, agreeing with Judge Weiner's determination that Diaconu's claims were time-barred, affirmed the district court judgment dismissing Diaconu's portion of the case. Accordingly, when Diaconu filed her May 5, 2006 motion to reopen, she was—as this court supposed—seeking "relief

from the district court order dismissing [her] complaint.” For that reason, the memorandum and order of January 8 constituted appropriate review of Diaconu’s motion to reopen. In addition, Diaconu’s motion for reconsideration does not point to any factual or legal issues that were properly presented but overlooked by the court. Therefore, in accordance with the Third Circuit’s holdings in *Harsco Corp.* and *NL Industries*, I decline to reconsider the order of January 8 as it relates to Diaconu’s motion to reopen. *Cf. Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (“Mere dissatisfaction with the Court’s ruling is not a proper basis for reconsideration.”).

B. Motion For Permission to File a New Suit

In the event that this court denies her motion for reconsideration, Diaconu intends to file a new tort action on the basis of “the cancer she was diagnosed with during the 2006 calendar year.” However, to “avoid the appearance of res [judicata],” Diaconu has petitioned the court for “specific, clearly spelled out permission” to do so. The government, in its response to this motion, argues that “plaintiff’s personal injury claim against the government accrued during the early 1990s . . . [when] her injuries . . . were sustained. The full extent to those injuries, *i.e.*, the alleged cancer, was not necessary to be known as of that time.” Docket # 50 at 8-9.

In *Marinari v. Asbestos Corp.*, 612 A.2d 1021, 1022 (Pa. Super. 1992), the Pennsylvania Superior Court determined that Pennsylvania’s two-year statute of

limitations for actions based on negligence and intentional exposure to a hazardous substance, 42 Pa. C.S.A. § 5524, should not “bar[] an action for lung cancer where the action was filed within two years of the cancer diagnosis but four years after [another asbestos-related disease] had been discovered.” *Id.* at 1022; *see also id.* (“Plaintiff’s discovery of [an asbestos-related disease] . . . does not trigger the statute of limitations with respect to an action for a later, separately diagnosed, disease of lung cancer.”) As the court explained, while Pennsylvania courts “have generally followed the rule that all claims against a defendant arising from a single transaction or occurrence must be asserted in a single action,” this approach does not serve the interests of justice in “latent disease cases.” *Id.* at 1027. Accordingly, the Superior Court decided to “join a majority of jurisdictions . . . by holding that an asbestos plaintiff may assert, in a second lawsuit, a claim for a distinct, separate disease if and when it develops at a later time.” *Id.* at 1028. The Pennsylvania Supreme Court has approved this holding on several occasions. *See, e.g., Zieber v. Bogert*, 773 A.2d 758, 761 (Pa. 2001) (noting that the “two-disease rule” in asbestos exposure cases permit[s] a plaintiff to commence separate causes of action for separate asbestos related diseases” and that this rule “was intended to remedy the inequities that arose in cases involving latent diseases that did not surface until years after the initial exposure”); *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145, 1148 (Pa. 1996) (same); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (same).

Plaintiffs’ 1998 complaint alleged that, while working at DLA/DPSC, exposure to

toxic substances caused Diaconu to develop health problems such as “hands and voice tremor, elevated function of the liver, CNS [central nervous system] disorder, respiratory and stomach[h] problems.” Docket # 8 at ¶ 15. The complaint further alleged that Diaconu’s symptoms had manifested as early as 1990. Diaconu now moves the court for permission to file a new tort suit on the grounds that she was diagnosed with cancer in March of 2006.

Because Diaconu appears to be alleging a latent disease, it would appear that she should have the benefit of the “two disease rule” set out in *Marinari* and subsequently affirmed by the Pennsylvania Supreme Court—especially because her situation cannot be readily distinguished from that of an asbestos plaintiff who, having filed an action shortly after the first symptoms of asbestosis, seeks to file an additional suit based on a “later, separately diagnosed, disease.” Accordingly, I will grant Diaconu permission to file a new suit based on her claimed 2006 diagnosis of cancer.

Conclusion

1. And now, upon consideration of plaintiff Eufrosina Diaconu’s Motion for Reconsideration or in Alternate Motion for Permission to File a New Toxic Tort Claim, (Docket # 49), and the government’s response thereto (Docket # 50), it is hereby ordered that:

- (1) Diaconu’s motion is **DENIED** insofar as it seeks reconsideration of the court’s order of January 8, 2007 (Docket # 47).

- (2) Diaconu's motion is **GRANTED** insofar as it seeks permission to file a new tort action on the basis of her cancer diagnosed in 2006.

2. On review of the Third Circuit's unpublished opinion, 33 Fed. Appx. 647 (3d Cir. 2002), accompanying its judgment remanding the claim of Dorothy Butler for further proceedings (docketed by the Clerk of this Court on July 9, 2002, Docket # 40), this court's order of January 8, 2007 is **VACATED** to the extent that it denied Dorothy Butler's motion to reopen her part of this case (Docket # 42); and the Clerk of this Court is hereby directed to reopen Civil Action No. 98-6533 so that further proceedings may be had with respect to Dorothy Butler's claims.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.