

FILED

JUN 26 2020

RACHELLE L. HARZ
J.S.C.

MARIA CRISTINA GONZALEZ-
TORRES AND FRANCISCO TORRES,
JR.

Plaintiffs,

vs.

ETHICON, INC., ETHICON WOMEN'S
HEALTH AND UROLOGY, a Division
of Ethicon, Inc., GYNECARE,
JOHNSON & JOHNSON, AND JOHN
DOES 1-20 (fictitious)

Defendants.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION – BERGEN COUNTY

: DOCKET NO. BER-L-18669-19 MCL

: MASTER CASE NO. L-11575-14

: Civil Action
: Pelvic Mesh/Gynecare Litigation, Case No.
: 291

ORDER

THIS MATTER having come before the Court on the Motion of Defendants, Ethicon, Inc. and Johnson & Johnson for an Order dismissing Plaintiffs' Complaint, Plaintiffs having opposed said Motion, and the Court having considered the papers filed and arguments made by counsel, and for good cause;

IT IS ON THIS 26th day of June, 2020 **ORDERED** that

Defendants' Motion is **DENIED**.

A copy of this Order shall be served upon all counsel within seven (7) days of the date of this Order.



J.S.C.

HONORABLE RACHELLE L. HARZ, J.S.C.

Superior Court of New Jersey, Law Division
Bergen County Justice Center
10 Main Street, Chambers 359
Hackensack, New Jersey 07601
(201) 221-0700, ext. 25557

Prepared by the court.

MARIA CHRISTINA GONZALEZ-
TORRES AND FRANCISCO TORRES, JR.,

Plaintiffs,

vs.

ETHICON, INC., ETHICON WOMEN'S
HEALTH AND UROLOGY, A DIVISION
OF ETHICON, INC, M GYNECARE,
JOHNSON & JOHNSON, JOHN DOES 1-
20, AND JANE DOES 21-40,

Defendants,

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY-LAW DIVISION

Docket No. BER-L-8669-19 MCL

Master Docket No. BER-L-11575-14

CIVIL ACTION

In re Pelvic Mesh/Gynecare Litigation
Case No. 291

DECISION

Before this court is a motion to dismiss filed by Ethicon, Inc. and Johnson & Johnson (hereinafter "defendants") on the basis that plaintiffs' claims are time-barred under New Jersey law. For the following reasons, the motion is DISMISSED without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 2010, plaintiff Maria Christina Gonzalez-Torres was implanted with an Ethicon, Inc. TVT product. On November 3, 2010, Ms. Gonzalez-Torres underwent a revision surgery. She underwent two more revision surgeries on November 10, 2010 and on October 15, 2012.

On January 23, 2013, plaintiffs filed a short form complaint in the Multi-District Litigation (hereinafter "the MDL action") in the United States District Court for the Southern District of West

Virginia alleging that plaintiff was injured by the TVT product. On October 17, 2018, defendants filed a motion to dismiss the MDL action for lack of subject matter jurisdiction, which is still pending. Both plaintiffs and defendants are citizens of New Jersey. On October 16, 2019, the case was transferred to the United States District Court for the District of New Jersey. On December 19, 2019, plaintiffs filed this product liability action in this Multi-County Litigation (hereinafter “the MCL action”).

ANALYSIS

New Jersey statutory law requires that a product liability action be commenced within “two years . . . after the cause of any such action shall have accrued.” N.J.S.A. 2A:14-2. A product liability action “generally accrues on the date of injury.” See Cornett v. Johnson & Johnson, 211 N.J. 362, 377 (2012), abrogated on other grounds by McCarrell v. Hoffman-LaRoche, Inc., 227 N.J. 569, 591 n.9 (2017).

Under New Jersey’s discovery rule, “[where] the plaintiff does not know or have reason to know that he has a cause of action against an identifiable defendant until after the normal period of limitations has expired, the considerations of individual justice and the considerations of repose are in conflict and other factors may fairly be brought into play.” Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 191 (2012) (citations and internal quotations omitted). Thus, the discovery rule

postpones the accrual of a cause of action so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity. Once a person knows or has reason to know of this information, his or her claim has accrued since, at that point, he or she is actually or constructively aware of that state of facts which may equate in law with a cause of action.

Id. (citations and internal quotations omitted). Plaintiffs bear the burden of proving that they are entitled to the benefit of equitable avoidance of the statute of limitations rule. See

Lopez v. Swyer, 62 N.J. 267, 272, 275-76 (1973). When the credibility of a party is not involved, the issue of whether or not a party is equitably entitled to the benefit of the discovery is rule is determined by a judge in a preliminary hearing. Id. at 275.

Under Galligan v. Westfield Ctr. Serv., Inc., 82 N.J. 188, 195 (1980), the filing of a complaint in federal court may suspend the running of the statutory period of limitations. In that case, plaintiff's counsel mistakenly filed a wrongful death action in federal court. Id. at 194. The action in federal court was timely, though jurisdictionally deficient. Id. at 193-94. After a motion to dismiss was brought, the federal case was dismissed for lack of diversity. Id. at 190. However, while the motion was still pending, the plaintiff filed in the Superior Court of New Jersey. Id. The filing was made 22 days after the statute of limitations had ran. Id. The court found that under these circumstances, the federal filing tolled the statute of limitations. Id. at 195. The court stated that it would be unjust to hold the plaintiff responsible for the ignorance of his attorney. Id.

Therefore, in order for this court to toll the statute of limitations from the time of the filing of the complaint in the South District of West Virginia under Galligan, this court must find that (1) the original filing was timely, and (2) the circumstances of that case are sufficiently similar to the case at bar to warrant tolling of the statute of limitations.

This court finds that the circumstances of this case are similar enough to Galligan to warrant tolling of the statute of limitations from the filing of the MDL action. Defendants have not asserted any prejudice. The causes of actions asserted in both the MDL action and the MCL action are identical. Thus, just like in Galligan, "timely notice of plaintiff's [product liability] claims -- albeit by the unconventional vehicle of a jurisdictionally deficient complaint -- has alerted defendants to the possibility of having to defend against the allegations." Galligan, 82 N.J at 193-94.

However, this court cannot find, based solely on the record before it, that the original MDL action was timely filed on January 23, 2013. Therefore, in accordance with Lopez, this court must hold a hearing regarding this issue at some point in time. Plaintiffs bear the burden of proving that they are entitled to the benefit of equitable avoidance of the statute of limitations rule.

CONCLUSION

Defendants' motion is DISMISSED without prejudice.

Dated: June 26, 2020



Rachelle L. Harz, J.S.C.