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Case No. K11C-03-015 RBY

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JASON KELLER,	:	
	:	**C.A. No: K11C-03-015 (RBY)**
Plaintiff,	:	
	:	
v.	:	
	:	
LARRY PAGE MACCUBBIN and JAMES M. BENNETT,	:	
	:	
	:	
Defendant.	:	

Submitted: March 9, 2012
Decided: May 16, 2012

Upon Consideration of Defendants'
Motion for Summary Judgment
DENIED

OPINION AND ORDER

Stephen J. Neuberger, Esq., The Neuberger Firm, Wilmington, Delaware for Plaintiff.

Roger D. Landon, Esq., Kelley M. Huff, Esq., Murphy & Landon, Wilmington, Delaware for Defendants.

Young, J.

Jason Keller v. Larry Page Maccubin, et al.
C.A. No: K11C-03-015(RBY)
May 16, 2012

SUMMARY

Defendants filed the instant motion to dismiss, converted to a motion for summary judgment, arguing that Plaintiff's personal injury claims were filed outside the statute of limitations, and that Plaintiff cannot sustain his burden of proving repressed memory. Because repressed memory may be applied to the "time of discovery" rule to toll the statute of limitations, and because further discovery may serve to sustain Plaintiff's application thereof, Defendants' motion, at this point in time, is **DENIED**.

FACTS

On March 8, 2011, Jason Keller (Plaintiff), a thirty-seven year old Florida resident, instituted this action against Larry Maccubbin and James Bennett (Defendants), residents of Washington, D.C. The amended complaint, filed April 1, 2011, alleges seven causes of action: 1) Assault and Battery; 2) Intentional Infliction of Emotional Distress; 3) False Imprisonment; 4) Conspiracy; 5) Aiding and Abetting; 6) Violation of Reporting Acts and Public Policy; and 7) Egregious Conduct. According to the amended complaint, Defendants sexually abused Plaintiff over the course of one week in June 1988. At the time, Plaintiff was fourteen years old, while Defendants were forty-five and thirty-two years old.

The amended complaint states that, as a result of the alleged abuse, Plaintiff suffered traumatic amnesia, causing his memory of the abuse to be repressed until it was triggered in October, 2009. Despite that assertion, on December 28, 2011, Defendants filed this motion to dismiss the complaint on the grounds that Plaintiff's claims were filed after the statute of limitations had run. In response thereto, Plaintiff

argued that his memory repression tolled the statute of limitations on the "discovery date" theory, until October, 2009.

Subsequent to Defendants' filing, but prior to oral argument thereon, Plaintiff produced the expert report of Dr. Carol Tavani, purporting it to sustain Plaintiff's memory repression theory. The matter was continued so that the parties had the opportunity to compound their motion filings to account for that report. Subsequently, the Court held oral argument during which the parties addressed the arguments presented in their original filings and those submitted in response to the report.

Dr. Tavani's report was filed under seal. Together with her accompanying affidavit, the report bolsters the credibility underlying Plaintiff's memory repression theory. Of course, that testimony may be more relevant, and may be tested, in the context of a *Daubert* hearing. For the purposes of the instant motion, the report identifies "classic" signs of memory repression exhibited by Plaintiff. After reporting Plaintiff's recount of the abuse during therapy, Dr. Tavani describes his dissociative experience as having occurred "during" trauma. Her report describes his experience as one which may occur when what "is occurring" is too painful to endure. The report does not state expressly the point at which Plaintiff's memory became repressed.

By the time oral argument was held, the deadline for discovery of experts had expired. At that time, however, non-expert discovery was still pending. The fruits of that process, whether discovered at this point or otherwise, have not been brought before the Court.

STANDARD OF REVIEW

The Court's standard of review on a motion to dismiss is well-settled. The Court accepts all well- pleaded allegations as true.[1] Well-pleaded means that the complaint puts a party on notice of the claim being brought.[2] If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.[3] The test for sufficiency is a broad one.[4] If any reasonable conception can be formulated to allow Plaintiff's recovery, the motion to dismiss must be denied.[5] Dismissal is warranted only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[6]

Where a motion to dismiss for failure to state a claim upon which relief may be granted considers matters outside of the pleadings, the motion must be treated as a motion for summary judgment.[7] Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment

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[1] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super. Mar. 31, 2009) (citing *Anglo American Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003)).

[2] *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *2 (Del. Super. Apr. 24, 2001) (citing *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995)).

[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[4] *Id*.

[5] *Id*.

[6] *Thompson v. Medimmune, Inc.*, 2009 Wl 1482237, at *4 (Del. Super. May 19, 2009) (citing *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Aug. 20, 2004)).

[7] Super. Ct. Civ. R. 12.

as a matter of law.[8] "Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances."[9] The movant bears the initial burden of establishing that no genuine issue of material fact exists.[10] Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.[11] When considering a motion for summary judgment, the Court considers the facts in the light most favorable to the non-movant.[12]

DISCUSSION

Defendants' motion, originally filed as a motion to dismiss, is two-fold. First, Defendants challenge the application of repressed memory to the "time of discovery" rule for the purpose of tolling the statute of limitations in child sexual abuse cases. That determination is based upon the pleadings alone. Accordingly, the motion to dismiss standard applies. Second, and in the alternative, Defendants' motion challenges the substance of Dr. Tavani's report, arguing that it does not satisfy Plaintiff's burden to prove repressed memory. That determination considers matters outside the pleadings. Accordingly, as expressed in Plaintiff's supplemental filing and referenced by Defendants in oral argument, the summary judgment standard applies.

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[8] *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

[9] *Id.*

[10] *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

[11] *Id.*

[12] *Tedesco*, 2006 WL 1817086 at *1.

Application of Repressed Memory to the "Time of Discovery" Rule

To place the issues into context, this case falls within the temporally unique class of cases that do not enjoy reprieve from the statute of limitations under the Child Victims Act.[13] Here, Plaintiff alleges abuse to have occurred prior to the Act's enactment. He did not file within the two year window afforded to those victims of child sexual abuse upon whom the statute of limitations window had closed. However, because the alleged abuse did not occur after the Act's enactment, he is not entitled to the Act's elimination of the statute of limitations. Hence, in terms of legal precedent, this issue is, in a sense, academic. Insofar as it pertains to the parties at the bar, however, this issue is very real.

Addressing Defendants' first argument, Plaintiff's claims are for personal injury.[14] As such, under 10 *Del. C.* § 8119, they are actionable only within two years from the time at which the injury was "sustained."[15] Defendants contend that, because Plaintiff did not institute this action until 2011, it is barred by the applicable statute of limitations. Plaintiff, however, contends that, due to his repressed memory of the events allegedly having taken place in 1988, the statute of limitations was tolled until he remembered those events in 2009. Thus, should the Court accept Plaintiff's argument, the statute would not begin to run until that point, making his 2011 filing timely.

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[13] 10 *Del. C.* § 8145.

[14] *See Eden v. Oblates of St. Francis de Sales*, 2006 WL 3512482, at *3 (Del. Super. Dec. 4, 2006).

[15] *Id.*

Plaintiff's argument requires the Court to consider the applicability of repressed memory to the long recognized "time of discovery rule." "This rule applies when an 'inherently unknowable injury' is sustained by a plaintiff 'blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time.'"[16] "Under such circumstances, the injury is deemed 'sustained' when the harmful effect first manifests itself and becomes physically ascertainable."[17]

The applicability of repressed memory to the "time of discovery" rule in personal injury cases involving child sexual abuse is relatively new to Delaware jurisprudence. This Court declined its application in both *Warner v. University of Delaware*[18] and *Garcia v. Nekarda*[19] on the grounds that the respective plaintiffs did not, in fact, suffer from repressed memory. It was not until 2006, in *Eden v. Oblates of St. Francis De Sales*,[20] that a Delaware Court was presented with a factual scenario warranting application of the theory, should it be deemed credible.

In *Eden*, the plaintiff presented expert testimony to corroborate his contention that, as a result of the sexual abuse he suffered as a child, he suffered from traumatic

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[16] *Id.* at *4.

[17] *Warner v. Univ. of Del.*, 1995 WL 656797, at *2 (Del. Super. Oct. 2, 1995) (citing *Layton v. Allen*, 246 A.2d 794, 798 (Del. 1968)).

[18] *Id.*

[19] 1993 WL 54491 (Del. Super. Feb. 19, 1993).

[20] 2006 WL 3512482 at *5.

amnesia, which repressed his memory of nine years worth of abuse.[21] The Court considered this to have been sufficient to toll the statute of limitations until the point at which the plaintiff regained his memory of the abuse.[22]

From *Eden* came *McClure v. Catholic Diocese of Wilmington, Inc.*[23] and *Vai v. St. Elizabeth's Roman Catholic Church*. In those cases, the Court found expert testimony regarding repressed memory to satisfy D.R.E. 702 and *Daubert*, thereby creating an issue of fact as to whether or not the statute of limitations was tolled.

Despite these recent developments, Defendants urge the Court not to augment what they classify as bad law. First, they point out that other jurisdictions have considered the science underlying the theory to be unreliable. Specifically, they point to *Doe v. Maskell*,[24] where the Maryland Court of Appeals rejected the theory, because it was "unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting."

Second, Defendants suggest that repression theory is not well-suited to sex abuse cases. A personal injury action for damages caused by sexual abuse of a child is, at its core, a claim for battery. Citing *Dalrymple v. Brown*,[25] Defendants argue that the physical contact giving rise to a battery claim is known immediately, thereby

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[21] *Id.*

[22] *Id.*

[23] No. 06C-12-235 (Del. Super. Apr. 7, 2009) (order granting admission of expert testimony regarding repressed memory).

[24] 679 A.2d 1087 (Md. App. 1996).

[25] 701 A.2d 164 (Pa. 1997).

rendering the position that the injury is inherently unknowable disingenuous.

The Court will not depart from what has become the consistent application of repressed memory to the "time of discovery rule." While the admissibility of testimony to that effect may be, properly, the subject of a *Daubert* challenge, the Court is not prepared to discount its applicability outright. As Delaware has come to realize, injury caused by child sexual abuse can, and does, extend far beyond that which is associated with a "typical" battery. Despite its relatively simplistic classification in tort, the effects thereof present concerns much greater than those associated with the typical physical injury.

Plaintiff's Burden to Establish Repressed Memory

We turn now to Defendants' alternative argument, having determined the issue of memory repression to be applicable in general. Plaintiff must still present facts sufficient to meet its burden that the issue of memory repression should be submitted to the jury. Defendants argue that, presuming the applicability of *Eden* and its progeny, which it has, Plaintiff fails to meet his burden because he has presented no evidence that his memory was repressed before the expiration of the original two year statute of limitations. If his memory was not repressed until <u>after</u> the expiration thereof, Defendants assert that he cannot claim that the statute should be tolled.

At this juncture, considering the facts in the light most favorable to Plaintiff as the non-movant, the evidence presented is insufficient to sustain Defendants' motion. The report's use of the words "during" and "is" suggests that Plaintiff's memory repression could have occurred at the time of the trauma in 1988. On the other hand, there has been no evidence to suggest that Plaintiff's memory was not repressed, if,

in fact, it was, until after the expiration of the statute of limitations in 1990.

Further discovery may present evidence to support or refute Plaintiff's contention. Plaintiff bears the burden to prove repressed memory. After discovery has been completed, Plaintiff may or may not be able to do so. At that time, renewal of Defendants' motion may be appropriate.

CONCLUSION

Defendants' motion to dismiss, converted to motion for summary judgment is **DENIED**.

SO ORDERED.

/s/ Robert B. Young
J.

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