

MEMORANDUM OF LAW IN SUPPORT
OF CROSS MOTION OF MONSANTO
COMPANY, INC. FOR SUMMARY JUDGMENT

Preliminary Statement

Defendant and third-party plaintiff Monsanto Company, Inc. ("Monsanto") submits this memorandum of law in support of its motion, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint as against Monsanto on the grounds that the causes of action set forth therein are barred by the applicable statutes of limitations.

Statement of Facts

The facts pertinent to the instant motion are set forth in detail in the accompanying affidavits of Mark S. Landman, Esq. and Irvin DeFrates (the "DeFrates Affidavit") to which this Court is respectfully referred. Briefly stated, however, the relevant facts are as follows:

This action was commenced by the filing of a Summons and Complaint with the Clerk of the Court, New York County, on May 31, 1983. In this action, plaintiff seeks to recover damages arising from alleged personal injuries and wrongful death sustained by her deceased husband Joseph E. Sireci (hereinafter, the "decedent"), which, she claims, resulted from the decedent's exposure during the course of his employment with "Kalex of W.R. Grace & Co., Inc." to polyvinyl chloride resins ("PVC resins") allegedly manufactured and/or supplied by the defendants.

Monsanto, among other defendants, has commenced a third-party action against Elm Coated Fabrics, Inc., Elm Coated Fabrics, Inc. d/b/a Elm Coated Fabrics Div. of Kalex Chemical Products, Inc., Elm Coated Fabrics Div. of Kalex Chemical Products, Inc. and Kalex Chemical Products, Inc. (hereinafter the "Third-Party Defendants"), as employers of the decedent, for indemnification and/or contribution with respect to any liability which may be adjudged against Monsanto herein.

As set forth in the DeFrates Affidavit, Monsanto terminated its manufacture of PVC resins in 1973, and has not sold PVC resins or any products containing same to the Third-Party Defendants, the decedent's employer(s), at any time since at least as far back as 1970.

As demonstrated below, plaintiff's claims against Monsanto are barred by the applicable statutes of limitations, and must therefore be dismissed as a matter of law.

Argument

I. THE CAUSES OF ACTION SET FORTH IN THE COMPLAINT AS AGAINST MONSANTO WITH RESPECT TO PERSONAL INJURIES ALLEGEDLY SUSTAINED BY THE DECEDENT ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The cause of action set forth in the Complaint with respect to personal injuries allegedly sustained by the decedent, by reason of the alleged negligence and/or strict liability on the part of the defendants, are governed by the three-year statute of limitations prescribed by CPLR § 214. See, e.g.,

Victorson v. Bock Laundry Machine Co., 37 NY2d 395, 373 NYS2d 39 (1975); Steinhardt v. Johns Manville Corporation, 78 AD2d 577, 432 NYS2d 422 (4th Dep't 1980), aff'd, 54 NY2d 1008, 446 NYS2d 244 (1981), appeal dismissed, 456 US 967 (1982).

Where, as in the case at bar, the personal injury is alleged to have been caused by exposure to a harmful substance, the three-year statute of limitations begins to run at the time of the injured party's last exposure to the substance. Steinhardt v. Johns Manville Corp., supra; Thornton v. Roosevelt Hospital, 47 NY2d 780, 417 NYS2d 920 (1979); Schwartz v. Heyden Newport Chemical Corp., 12 NY2d 212, 237 NYS2d 714, modified, 12 NY2d 1073, 239 NYS2d 896 (1963). In Steinhardt v. Johns Manville, supra, for example, the plaintiff claimed that he had developed cancer due to employment-related exposure to asbestos manufactured by the defendant. The Court dismissed the complaint as time-barred, since plaintiff's last exposure to the asbestos occurred five years prior to the commencement of the action.

Thus, plaintiff's claims in this action as against Monsanto with respect to personal injuries allegedly sustained by the decedent are timely only if the decedent was exposed to PVC resins manufactured and/or supplied by Monsanto within three years prior to May 31, 1983, the date this action was commenced. As set forth in the DeFrates Affidavit, Monsanto terminated its manufacture of PVC resins in 1973, and has not sold PVC resins or any products containing same to the Third-Party Defendants, the decedent's employer(s), at any time since at least as far back as

1970. Plaintiff's claims against Monsanto as to personal injuries allegedly sustained by the decedent are, therefore, time-barred since for at least 13 years prior to the commencement of this lawsuit Monsanto had not manufactured or supplied the decedent's employer(s) with the allegedly hazardous substance.

II. THE CAUSES OF ACTION SET FORTH IN
THE COMPLAINT AS AGAINST MONSANTO WITH
RESPECT TO THE ALLEGED WRONGFUL DEATH
OF THE DECEDENT ARE BARRED BY THE
APPLICABLE STATUTE OF LIMITATIONS

EPTL § 5-4.1 provides that the representative of a decedent's estate may commence an action based upon the alleged wrongful death of the decedent within two years after the decedent's death, provided the decedent could have timely commenced a personal injury action on his own behalf, had death not ensued, against the same defendant on the date of the alleged wrongful death. See, EPTL § 5-4.1 (Prac. Comm.) (McKinney 1981); Prink v. Rockefeller Center, Inc., 48 NY2d 309, 422 NYS2d 911(1979); Myers v. City of Plattsburgh, 13 AD2d 866, 214 NYS2d 773 (3d Dep't 1961).

Although plaintiff commenced this action exactly two years after the decedent's death, her wrongful death claims against Monsanto are time-barred because the decedent had no timely cause of action against Monsanto on the date of his death. The decedent died on May 31, 1981, without having commenced an action against Monsanto. As discussed in Point I above, paragraphs 5 and 6, and in the accompanying Memorandum of

Law, assuming death had not ensued, the decedent could have commenced a timely action against Monsanto on May 31, 1981 for damages arising from personal injuries only if he had been exposed to the allegedly hazardous substance manufactured or supplied by Monsanto within three years prior to May 31, 1981 (CPLR § 214). As set forth in the DeFrates Affidavit, Monsanto neither manufactured PVC resins nor supplied the decedent's employer with PVC resins or any product containing PVC resins within at least 11 years preceding May 31, 1981. No timely personal injury action, therefore, could have been commenced by the decedent against Monsanto on the date of the decedent's death. The causes of action set forth in the Complaint based upon the alleged wrongful death of the decedent are, therefore, time-barred.

Conclusion

The Complaint against Monsanto should be dismissed in its entirety as a matter of law since each and every cause of action contained therein is barred by the applicable statute of limitations.

Respectfully submitted,

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