UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GERALDINE MILLS, M.D., Plaintiff,	:	
v.	:	CA 04-393S
PARA-CHEM d/b/a PARA-CHEM SOUTHERN, INC., PARA-CHEM STANDARD DIVISION, and PARA-CHEM, alias, a foreign corporation, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendant's Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss" or "Motion"). Dismissal is sought by Para-Chem, d/b/a/ Para-Chem Southern, Inc., Para-Chem Standard Division, and Para-Chem ("Defendants" or "Para-Chem") pursuant to Fed. R. Civ. P. 12(b)(6) because the Complaint is both time-barred and precluded by the doctrine of *res judicata*. Plaintiff Geraldine Mills, M.D. ("Plaintiff" or "Dr. Mills") has filed an objection to the Motion to Dismiss.

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on March 23, 2005. For the reasons stated herein, I recommend that the Motion to Dismiss be granted.

Facts[1] and Travel

Plaintiff is a pediatrician whose office was located at 65 Jefferson Boulevard in Warwick, Rhode Island. In March of 1996,

[1] The facts are taken from the Complaint and the decision of the Rhode Island Supreme Court in Mills v. State Sales, Inc., 824 A.2d 461, 464-67 (R.I. 2003).

a leak from an upstairs office damaged the carpet in Plaintiff's office. The landlady had the carpet in Plaintiff's office replaced on or about July 18, 1996, with a carpet manufactured by Beaulieu of America, Inc. ("Beaulieu"), and installed by State Sales, Inc. ("State Sales"). Thereafter, the rug and/or cement emitted strong, noxious vapors to such a degree that Plaintiff, her family, her employees, and her patients complained of a variety of symptoms, including burning eyes, scratchy throats, dizziness, nausea, headaches, vertigo, and pressure in the ears. Plaintiff complained to the landlady, Beaulieu, State Sales, the Rhode Island Department of Environmental Management, and the Rhode Island Department of Health. The Department of Health subsequently sent Robert Weisberg to conduct air quality testing of Plaintiff's vacant office. He also removed a section of the carpet for further testing. Neither test revealed the presence of toxic substances or fumes. In early to mid-August of 1996 Plaintiff vacated the office, taking her belongings, including medical records, patients' charts, books, furniture, and curtains, with her. However, as Plaintiff subsequently learned, the belongings she removed from her office may have been contaminated, and the same noxious vapors continued to cause adverse effects to Plaintiff as well as to her family, employees, and patients in her new location.

In July of 1999, Plaintiff sued Beaulieu, State Sales, her landlady, Robert Weisberg, and John Doe Cement Co., alias, in the Rhode Island Superior Court. The hearing justice conducted a pretrial hearing pursuant to Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), after the defendants challenged the validity and relevance of the proposed trial testimony of Plaintiff's experts. The hearing justice concluded that the experts' opinions could not withstand scrutiny under Daubert and refused to allow them to testify. The

defendants then moved for judgment as a matter of law pursuant to Rule 50 of the Superior Court Rules of Civil Procedure. Finding that the exclusion of Plaintiffs' proposed experts precluded her from establishing a causal relationship between the carpet and her injuries, the hearing justice on September 6, 2001, granted the defendants' motion and dismissed the claims against all defendants.

Plaintiff timely appealed to the Rhode Island Supreme Court, which on June 10, 2003, affirmed the judgment of the Superior Court. See Mills v. State Sales, Inc., 824 A.2d 461, 464 (R.I. 2003). The court concluded that despite the fact that "Rule 50 was the improper vehicle for disposing of the plaintiff's claims, that error was harmless in this case." Id. at 473. The court elaborated that "[t]o succeed on her personal injury claims, it was incumbent on the plaintiff to establish a causal connection between the carpet and her alleged injuries .... In this case, it was obvious to the trial justice and counsel that the plaintiff was unable to present any expert evidence to support her claim." Id.

Plaintiff filed a Complaint (Document #1) in this court on September 7, 2004. Para-Chem on December 10, 2004, filed an Answer (Document #3) to the Complaint. On February 10, 2005, Para-Chem filed the instant Motion to Dismiss (Document #4), to which Plaintiff filed an objection (Document #6) on February 22, 2005. A hearing was held on March 23, 2005, and the matter was taken under advisement.

Law

I. Pro Se Status

Plaintiff is proceeding pro se, and her Complaint is held to a less stringent standard than one drafted by a lawyer. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed. 652 (1972). It is to be "read ... with an extra degree of

solicitude." Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991). The court is required to construe liberally a pro se complaint, see Strahan v. Coxe, 127 F.3d 155, 158 n.1 (1st Cir. 1997); Watson v. Caton, 984 F.2d 537, 539 (1st Cir. 1993), and may grant a motion to dismiss "only if plaintiff cannot prove any set of facts entitling h[er] to relief," Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). At the same time, a plaintiff's pro se status does not excuse her from complying with procedural rules. See Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 24 n.4 (1st Cir. 2000).

II. 12(b)(6) Standard

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court construes the complaint in the light most favorable to the plaintiff, see Paradis v. Aetna Cas. & Sur. Co., 796 F.Supp. 59, 61 (D.R.I. 1992); Greater Providence MRI Ltd. P'ship v. Med. Imaging Network of S. New England, Inc., 32 F.Supp.2d 491, 493 (D.R.I. 1998), taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences, see Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v. Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995); Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994). If under any theory the allegations are sufficient to state a cause of action in accordance with the law, the motion to dismiss must be denied. See Hart v. Mazur, 903 F.Supp. 277, 279 (D.R.I. 1995). The court "should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts." Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996); accord Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also Arruda, 310 F.3d at 18 ("[W]e will affirm a Rule 12(b)(6) dismissal only if 'the factual averments do not justify recovery on some theory adumbrated in the complaint.'").

The court, however, is not required to credit "bald assertions, unsupportable conclusions, and opprobrious epithets." Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 16 (1st Cir. 1989)(internal quotation marks omitted)(quoting Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir. 1987)). Rule 12(b)(6) is forgiving, but it "is not entirely a toothless tiger." Campagna v. Massachusetts Dep't of Envtl. Prot., 334 F.3d 150, 155 (1st Cir. 2003)(quoting Dartmouth Review). A plaintiff must allege facts in support of "each material element necessary to sustain recovery under some actionable legal theory." Dartmouth Review, 889 F.2d at 16 (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988)).

In general, when dealing with a motion to dismiss under Fed. R. Civ. P. 12(b)(6), consideration of documents not attached to the complaint or expressly incorporated therein requires conversion of the motion to one for summary judgment pursuant to Fed. R. Civ. P. 56. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). "However, courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." Id.[2]

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[2] The Appendix to Defendants' Motion to Dismiss ("Defendants' App.") consists of a copy of the complaint Plaintiff filed in the Rhode Island Superior Court in Civil Action No. KC 99-542. Plaintiff neither disputes the authenticity of that document nor the fact that it is a public record. See Plaintiff's Memorandum of Law in Support of Objection to Defendant's Motion to Dismiss ("Plaintiff's Mem.") at 8 ("[T]he complaint in the previous action is a public record and it is appropriate to refer to the complaint in the Previous Action."). The court has considered both the prior complaint in KC 99-542 and the decision of the Rhode Island Supreme Court affirming the Superior Court's dismissal of that action, see Mills, 824 A.2d 461 (R.I. 2003), in evaluating the Motion to Dismiss, see Watterson v. Page, 987 F.2d 1, 4 (1st Cir. 1993)("[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment.")

Discussion

Defendants argue that Plaintiff's Complaint is barred by the statute of limitations, see Defendants' Memorandum of Law in Support of Their Motion to Dismiss ("Defendants' Mem.") at 1, 5, and by the doctrine of *res judicata*, see id. at 1-2, 8-10. Because the court concludes that Plaintiff's Complaint is time-barred, the court need not address Defendant's *res judicata* argument. Rhode Island General Laws § 9-1-14 provides, in relevant part, that:

> Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after.

R.I. Gen. Laws § 9-1-14(b) (1997 Reenactment). Section 9-1-14(b) "governs all tort suits to recover damages for personal injuries, regardless of the particular legal theory on which relief is sought." Arnold v. R.J. Reynolds Tobacco Co., 956 F.Supp. 110, 113 (D.R.I. 1997)(citing Pirri v. Toledo Scale Corp., 619 A.2d 429, 430-31 (R.I. 1993)(holding that personal injury claim based on product liability, negligence, implied warranty, and failure to warn was governed by § 9-1-14(b)); see also Renaud v. Sigma-Aldrich Corp., 662 A.2d 711, 714 (R.I. 1995)(holding, in product liability action, that "the three-year limitation period set forth in § 9-1-14(b) for commencing actions for 'injuries to the person' is the applicable statute of limitations")(citing Pirri.).

According to Para-Chem, "Plaintiff filed her Complaint with the United States District Court for the District of Rhode Island on September 7, 2004. Plaintiff's alleged injury occurred on or about July 18, 1996. Thus, the Plaintiff did not file the present claim until well over eight (8) years after the cause of

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(quoting Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986))(alteration in original).

action accrued, which is over five (5) years after the statute of limitations had run." Defendants' Mem. at 5. Plaintiff counters that the "cause of action accrued from the time of discovery that Para-Chem was responsible for the injuries and interference with normal course of business." Plaintiff's Memorandum of Law in Support of Objection to Defendant's Motion to Dismiss ("Plaintiff's Mem.") at 1. Thus, the issue before the court is when Plaintiff's cause of action accrued. See Arnold, 956 F.Supp. at 113 ("The dispute in this case centers on when the cause of action accrued, and whether defendants concealed the existence of the cause of action so as to toll the running of the limitations period.").

Generally, a cause of action for personal injury accrues, and the statute of limitations begins to run, at the time of injury. See Arnold, 956 F.Supp. at 113; Martin v. Howard, 784 A.2d 291, 299 (R.I. 2001); Renaud, 662 A.2d at 714. "However, in certain narrowly circumscribed factual situations, [the Rhode Island Supreme Court] has held that a statute of limitations will not begin to run until an injury or some wrongful conduct should have, in the exercise of reasonable diligence, been discovered." Renaud, 662 A.2d at 714-15; see also Arnold, 956 F.Supp. at 113 ("[T]he Rhode Island Supreme Court has recognized that for some factual settings, the operation of a 'discovery rule' serves to set this accrual date at some time beyond the actual date of injury."); Martin, 784 A.2d at 299 ("[I]n some narrowly circumscribed factual situations, however, when the fact of the injury is unknown to the plaintiff when it occurs, the applicable statute of limitations will be tolled and will not begin to run until, in the exercise of reasonable diligence, the plaintiff should have discovered the injury or some injury-causing wrongful conduct.")(internal quotation marks and citation omitted). The Rhode Island Supreme Court has limited the use of this discovery

rule to cases involving medical malpractice, see Wilkinson v. Harrington, 243 A.2d 745, 747-48, 753 (R.I. 1968), claims relating to improvements to real estate, see Lee v. Morin, 469 A.2d 358, 359-60 (R.I. 1983), and actions concerning drug product liability, see Anthony v. Abbott Labs., 490 A.2d 43, 44, 48 (R.I. 1985).

Plaintiff argues that the discovery rule is applicable in the instant matter. See Plaintiff's Mem. at 10; see also id. at 8 ("Not until September 6, 2001[,] did the Plaintiff become aware (discovery) that the product Magnum Plus Gold was the major source of the styrene ...."); Complaint ¶ 15[3] ("On or about September 6, 2001, Plaintiff became fully aware that the carpet was just one factor in her personal injury, the other being the adhesive known as Magnum Plus Gold—4099."). Plaintiff acknowledges that she "brought a claim against Beaulieu, State Sales, Robert Weisberg[,] an Industrial Hygienist sent by the Rhode Island Department of Health, and John Doe Cement Co., alias[,] [i]n 1999 within the required statute of limitations." Complaint ¶ 6. Plaintiff described the John Doe Carpet Cement company as "the unknown manufacturer of the cement used to install the carpet in Plaintiff's offices." Appendix to Defendants' Motion to Dismiss (complaint filed in Civil Action No. KC 99-542) ("Defendants' App.") ¶ 4. She argues that the failure to name Para-Chem in the previous action was due to the fact that the defendants there not only failed to inform Plaintiff who the John Doe defendant was, but also denied that any cement was used in the installation of the carpet on July 18, 1996. See Complaint ¶¶ 8-10; Plaintiff's Mem. at 2, 5, 6, 9, 12. According to Plaintiff, the defendants in the previous litigation "with wanton disregard purposefully and negligently withheld had

[3] In her Complaint Plaintiff has included two paragraphs numbered fifteen. The court cites to the second ¶ 15.

concealed this information from the Plaintiff from July 19, 1999[,] when Plaintiff filed that action to on or about August 30, 2001[,] when [d]efendant State Sales, Inc[.,] handed Plaintiff information citing Para-Chem as the [d]efendant named in 1999 as John Doe Cement." Plaintiff's Mem. at 2. On or about August 30, 2001, during a deposition in the prior litigation, counsel for State Sales gave Plaintiff information identifying the product Magnum Plus Gold—4099 as the adhesive which State Sales would have provided to the installer, although State Sales continued to deny that any adhesive was used in the installation of the carpet in Plaintiff's office. See Complaint ¶ 11; Plaintiff's Mem. at 2. Thereafter, Plaintiff purchased a five gallon drum of Magnum Plus Gold—4099 and sent it for testing. See Complaint ¶ 12; Plaintiff's Mem. at 2. Plaintiff states that she received the results, which confirmed the presence of certain chemicals known as volatile organic compounds ("VOCs"), on or about September 6, 2001. See Complaint ¶¶ 13, 15; Plaintiff's Mem. at 2. Thus, in Plaintiff's view, the instant Complaint is not time-barred under R.I. Gen. Laws § 9-1-14(b) "because it does meet the three year statute being filed on or about September 6, 2004[,] three years to the date of receipt of Data Chem results on the composition of the product Magnum Plus Gold." Plaintiff's Mem. at 2. The court rejects Plaintiff's argument for the following reasons.

As an initial matter, the court notes that the Rhode Island Supreme Court has declined to extend the discovery rule to product liability actions other than those involving drug product liability. See Renaud, 662 A.2d at 716; see also Arnold, 956 F.Supp. at 114 (noting that "[i]n its most recent discussion of Anthony, the [Rhode Island Supreme] Court left no doubt that the rule announced therein applies solely to drug product liability cases, and not to product liability or personal injury cases generally")(citing Renaud). Although Plaintiff argues that "[a]s

to the RI Supreme Court extending the discovery rule to only including 'certain types of property damage and drug product liability,' and to 'certain narrowly defined factual situations,' admittedly the RI State Courts have never addressed the issue of carpet and glue toxicity as it pertains to the situation at hand," Plaintiff's Mem. at 12, and that "only extending the rules to cover those of drug product liability underscores the very need of change needed in the RI State Court Judicial system," id., the fact remains that the Rhode Island Supreme Court has declined Plaintiff's invitation to extend the discovery rule to product liability and personal injury cases in general, see Arnold, 956 F.Supp. at 114.

Moreover, "the discovery rule concerns the discovery that one has suffered an injury, not the discovery of the identity of the party allegedly responsible for causing the injury." Renaud, 662 A.2d at 715; see also id. ("Anthony does not stand for the proposition that the statute of limitations is tolled until a plaintiff should have discovered the *identity* of the drug manufacturer."). The court agrees with Para-Chem's statement that "by the Plaintiff's own admission she knew of the alleged injury and the basis of the alleged cause of action in the summer of 1996." Defendants' Mem. at 2.

In the Superior Court complaint filed in 1999, Plaintiff alleged that: "JOHN DOE CARPET CEMENT is the unknown manufacturer of the cement used to install the carpet in Plaintiff's offices," Defendants' App. ¶ 4; "[o]n or about July 18, 1996[,] [d]efendants, jointly and severally, replaced carpet in Plaintiff's offices located at 65 Jefferson Boulevard, Warwick, Rhode Island," id. ¶ 7; "[t]hereafter, the rug and/or cement emitted strong, noxious fumes to such a degree that Plaintiff's patients and Plaintiff herself complained of burning eyes, scratchy throats and dizziness after just a few minutes in the

premises," id. ¶ 8; "Plaintiff complained to both the landlord and to the [d]efendants, stating that the rug and/or cement was defective in that it caused her, her employees and patients to become ill due to the fumes," id. ¶ 9; "[d]efendants failed and refused to do anything about the defective rug and/or cement," id. ¶ 10; "[o]n or about August 9, 1996[,] the noxious fumes were such that Plaintiff could no longer carry on her trade and profession in the premises," id. ¶ 11; and "Plaintiff vacated the premises, and lost business due to having to vacate the premises," id. ¶ 12. She further alleged that the defendants, jointly and severally, manufactured, sold, and installed the carpet and/or cement in her offices, that they had a duty to do so in a workmanlike manner, and that they were negligent in failing to do so. See id. ¶¶ 14-16. Plaintiff stated that "[t]hrough the negligent and/or improper application or use of the materials to install the rug, the [d]efendants, jointly and severally, have chemically assaulted the Plaintiff," id. ¶ 19, and that, as a result, "Plaintiff sustained physical injury, pain and suffering and sustained a loss of business, income and earning capacity and expense for medical treatment," id. ¶ 17.

In the Complaint filed in this court, Plaintiff includes the same (or similar) allegations regarding the installation of the carpet in her office on July 18, 1996, see Complaint ¶ 3; the resulting "strong noxious vapors," id. ¶ 4, which the rug and/or cement emitted, see id., and which caused Plaintiff and others to suffer "myriads of symptoms," id.; her complaints to her landlady, State Sales, Beaulieu, the Rhode Island Department of Environmental Management, and the Rhode Island Department of Health that "the rug and/or cement was defective in that it caused her, her employees and patients to become adversely [a]ffected by the vapors," id. ¶ 5; and her relocation to different premises on August 15, 1996, with all of her

belongings, and loss of business which resulted therefrom, see id. ¶ 7. Plaintiff notes that she brought a claim against various defendants, including "John Doe Cement Co., alias," Complaint ¶ 6, in 1999 "within the required statute of limitations," id., and that those "claims were brought for these part[ie]s jointly and severally failed and refused to do anything about the defective rug and/or cement," id. Additionally, she notes that the 2001 test results on the Magnum Plus Gold—4099 were consistent with previous test results on a "yellow mustard appearing substance found on the bottom of the carpet and carpet pad ...." Id. ¶ 12; see also Plaintiff's Mem. at 2 (stating that results of the testing of Magnum Plus Gold "clearly matched those of samples taken from the site of the carpet installation (samples both from August 15, 1996[,] and from May 10, 2001). The results also matched the chemicals determined to be the cause of acute and chronic personal injury to the Plaintiff (as determined in 1996 and after May 2001).").[4]

It is abundantly clear to the court that not only was Plaintiff aware of her injury in July and August of 1996, but she was also aware that the cement may have played a role in that injury. As Senior Judge Ronald R. Lagueux stated in Arnold:

> In general, once a plaintiff is aware that he or she has been injured by a product, that plaintiff has enough information to commence a products liability action based on that injury. For the action to accrue, a plaintiff does not need to be aware of all the facts supporting the claim, such as whether a particular component was defective or whether and how the design was flawed--such factual investigation is the subject of the discovery process. Plaintiffs' view, which is essentially that a cause of action does not accrue until the investigation

[4] Plaintiff also states in her memorandum that on July 18, 1996, Plaintiff observed both a clear cement foundation and a yellow glue-like substance that had not previously been present. See Plaintiff's Mem. at 6.

> is complete, "would render the statute of limitations meaningless and ineffective."

Arnold, 956 F.Supp. at 117; see also Martin, 784 A.2d at 300 (rejecting plaintiff's argument that "she did not appreciate the full nature and extent of her injuries at the time she first knew she had suffered harm"); Renaud, 662 A.2d at 716 ("In the case at bar, plaintiff was aware that she was injured within hours of her exposure to the acetic acid fumes. She experienced symptoms that caused her to seek emergency medical treatment on the very afternoon of her exposure to those fumes. Unlike Wilkinson and Lee where the plaintiffs, even if they had used reasonable diligence, could not have discovered that they had suffered an injury until after the applicable statutes of limitations had expired, in the instant case plaintiff knew that she was injured almost simultaneously with the event precipitating the injury."); Anthony, 490 A.2d at 45 ("The reasoning behind Wilkinson and Lee is that a person should have reasonable opportunity to become cognizant of an injury and its cause before the statute of limitations begins to run.").

Finally, the Rhode Island Supreme Court in Renaud rejected an argument very similar to that of Plaintiff here that the defendants in KC 99-542 "conceal[ed] the information necessary to fully and properly litigate the previous action," Plaintiff's Mem. at 6, namely the identity of the John Doe defendant, see id. at 5, 9. In Renaud, the plaintiff was injured as a result of inhaling fumes from acetic acid that had spilled at her place of employment, Landmark Medical Center. See Renaud, 662 A.2d at 713. She sued Sigma-Aldrich Corporation ("Sigma-Aldrich"), alleging that Sigma-Aldrich had manufactured and supplied the container holding the acetic acid involved in the incident. See id. Approximately four and a half years after the spill, documents were obtained pursuant to a subpoena which indicated

that the supplier was Fisher Scientific Co. ("Fisher"), not Sigma-Aldrich. See Renaud, 662 A.2d at 713. The Plaintiff moved to amend her complaint to add Fisher, which motion was granted. See id. Fisher thereafter filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), claiming that the three year statute of limitations against it had expired prior to its being added as a defendant. See id. The motion was denied, and Fisher appealed. See id.

The Renaud court stated that:

> The plaintiff asserts that she exercised reasonable diligence in her efforts to identify the party that manufactured and supplied the container holding the acetic acid to Landmark. She alleges, however, that her efforts to identify the manufacturer/supplier were frustrated by, inter alia, Landmark employees, who told her that the manufacturer of the container was Sigma Chemical; employees of Landmark's purchasing department, who told her that invoices for the acetic acid were unavailable; and Landmark's workers' compensation insurance carrier, who sent a subrogation notice to Sigma Chemical. Although certain of these contentions were disputed by the Sigma defendants, plaintiff nevertheless claims that she reasonably and detrimentally relied on information obtained from her employer, who misled her into believing Sigma Chemical to be the proper defendant. The plaintiff further suggests that Landmark employees and the two Sigma defendants may have even intentionally concealed the identity of the supplier of the container.
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> Even if we accept each of plaintiff's allegations as true, they provide no basis for tolling the statute of limitations on a cause of action against Fisher. In order to toll the running of the statute of limitations with respect to Fisher, there would have to be a showing that Fisher, the party asserting the statute-of-limitations defense, attempted by fraud or misrepresentation to conceal the existence of the cause of action. The plaintiff does not allege that Fisher in any way attempted to conceal the existence of the cause of action against it. Her claims of concealment are directed at only Landmark and possibly the two Sigma defendants. Consequently plaintiff's allegations, even if accepted as true, cannot serve to toll the statute of limitations on a cause of action against Fisher.

Renaud, 662 A.2d at 714 (internal citations and footnote omitted). The same is true in the instant matter. Plaintiff has made no allegations that Para-Chem concealed its identity from her. Accordingly, the court rejects Plaintiff's contention that because the actions of the defendants in KC 99-542 precluded her from naming Para-Chem previously the statute of limitations as it pertains to Para-Chem should run from September 6, 2001.

Statutes of limitations "promote certainty and finality and avoid stale claims ...." Roe v. Gelineau, 794 A.2d 476, 485 (R.I. 2002); see also Martin, 784 A.2d at 299 (noting that theory behind statutes of limitations is that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them"). Based on the foregoing, the court concludes that the discovery rule is inapplicable in these circumstances and that Plaintiff's cause of action against Para-Chem is barred by the three-year statute of limitations.

Conclusion

For the reasons stated above, I recommend that the Motion to Dismiss be granted because the Complaint is time-barred. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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DAVID L. MARTIN
United States Magistrate Judge
April 11, 2005