SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

LOIS PROKOCIMER,

Plaintiff(s),

- against -

AVON PRODUCTS, INC., *et al.*,

Defendants.

INDEX NO.	190030/2017
MOTION DATE	11/28/2018
MOTION SEQ. NO.	008
MOTION CAL. NO.	

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Johnson & Johnson and Johnson & Johnson Consumer Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint is granted to the extent of dismissing the express warranty claim asserted in the third cause of action, the fourth, fifth, sixth, seventh, eighth and ninth causes of action. The remainder of the relief sought is denied.

Plaintiff, Lois Prokocimer, was diagnosed with pleural mesothelioma and pulmonary adenocarcinoma (lung cancer) on or about September of 2016. She was born on September 23, 1936 and is approximately 82 years old. Plaintiff alleges she was exposed to asbestos in a variety of ways. Her exposure - as relevant to this motion - is from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson's Baby Powder ("JBP"). Mrs. Prokocimer alleges that she used the defendants' product daily from about 1946 to 1969, and less regularly from the 1980s to 2017.

At her deposition Ms. Prokocimer testified that she recalled her mother used JBP on her daily as a child. She could not specifically recall what years her mother started using it. She testified that her mother would shake JBP on her from the neck down. She remembered that when her mother applied JBP it became very dusty and the powder would go all over the place (Mot. Kurland Aff., Exh. D, pgs. 363-368). She testified that she started using JBP on herself around the age of seven until she got married in 1955. She remembered using JBP daily and sprinkling it directly onto her body for about two minutes, with no more than ten shakes of the bottle (Mot. Kurland Aff., Exh. D, pgs. 365-371).

She testified that when her first child, Ilyse, was born in 1956 she used JBP on herself and her daughter on a daily basis. She would pour the powder all over her daughter Illyse and rub it in. Mrs. Prockocimer folllowed this procedure until Illyse was able to stand, at that point she would sprinkle JBP all over her daughter and pat it down. She powdered Ilyse until she was old enough to do it herself (Mot. Kurland Aff., Exh. D, pgs. 375-376, Opp. Exh. 2, pg. 37-38). She testified that the procedure used to apply JBP to Ilyse was followed after her second child, Susan, was born in 1958 and for her youngest daughter Bonnie after she was born in 1960. Mrs. Prockocimer could not remember the exact year she stopped using JBP on her children, only that it was before 1970 (Mot. Kurland Aff., Exh. D, pgs. 377-379). She also used JBP on her children when she changed their diapers (Opp. Exh. 2, pgs. 45-46). Mrs. Prockocimer testified that whether she used the JBP on herself or her children, the dust could be seen in the air (Opp. Exh. 2, pgs. 39-40,46-47).

Mrs. Prockocimer stopped using JBP daily on herself in the late 1970's (Opp. Exh. 2, pg. 38), but continued to use JBP on herself while on vacations throughout the 1970's and 1980's (Opp. Exh. 2, pgs. 44 - 45). She still had a trial size bottle in her home at the time of the deposition in 2016 (Mot. Kurland Aff., Exh. D, pgs. 383 - 384). She did not remember reading the writing on the JBP packaging or reading any instructions (Mot. Kurland Aff., Exh. D, pgs. 383-384).

Plaintiff commenced this action on February 2, 2017 to recover for damages resulting from her exposure to asbestos from defendants' products. Plaintiff's Standard Complaint - incorporated into the Short-Form Complaint - asserts nine causes of action for: (1) negligence, (2) strict liability, (3) breach of warranty, (4) premises liability, Labor Law and NYS Industrial Code Violations, (5) liability for contractors and subcontractors, (6) liability for "dust mask" defendants, (7) civil conspiracy and fraud, (8) William S. Prokocimer's loss of consortium, and (9) punitive damages (Mot. Kurland Aff., Exh. A). The defendants answered plaintiff's complaint on March 8, 2017 (Mot. Kurland Aff., Exhs. B and C).

Defendants, Johnson & Johnson (hereinafter referred to individually as "JJ") and Johnson & Johnson Consumer Inc.'s (hereinafter referred to individually as "JJCI") now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants' argue that plaintiff is not expected to present any admissible evidence of exposure to asbestos. This argument does not establish their entitlement to summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to Reid v. Georgia - Pacific Corp., 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Mrs. Prokocimer either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*),122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendants argument that plaintiffs have no evidence and cannot raise an issue of fact that Mrs. Prokocimer was exposed to asbestos from the use of JJBP during the relevant periods of 1946 to 1969 and the 1980s to 2016, is not a basis to obtain summary judgment.

Defendants apply the standards asserted in Sean R. v. BMW of N. Am., LLC, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016] and In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233,48 N.Y.S. 3d 365 [1st Dept., 2017], arguing that summary judgment is warranted as to the plaintiffs' strict liability and negligence claims because of lack of causation. Defendants claim that there is no asbestos contamination from their products because: (1) the talc was sourced from asbestos free mines, (2) the mined talc was purified, (3) there were internal tests to ensure the lack of contamination and (4) both government and independent tests confirmed the product was asbestos free. It is defendants' contention that their defense experts

establish Mrs. Prokocimer was not exposed to asbestos through use of their products or that they did not cause her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. F, G, H, I, S, and W), FDA findings in 1976 (Mot. Kurland Aff. Exh. X), and the expert affidavits of Gregory B. Diette, M.D. M.H.S., Dana M. Hollins, MPH, CIH, Brent L. Finley, Ph.D., DABT and Mathew S. Sanchez, Ph.D., to establish that Mrs. Prokocimer was not exposed to asbestos through use of their products or that they did not cause her mesothelioma. Defendants claim that during the periods relevant to Mrs. Prokocimer exposure, JJBP talc was obtained from one of three sources, Val Germanasca, Italy (1946-1964, 1967 or 1968), Vermont (1964, 1967,1968 - 2003), and Guangxi, China (starting in 2003).

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She is employed as a Principal Health Scientist by Cardno ChemRisk, a private scientific consulting firm. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers. Ms. Hollins prepared two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products for powdering infants (1) over a period of two years and (2) over a 70 year lifetime (Hollins Aff. Table 1 and Table 2, pgs. 21 and 22). A third table was prepared applying specifically to Mrs. Prokocimer's potential exposure to JJP, relying on the same data as the other two tables (Hollins Aff., pgs. 27-28, para. 80, Table 3). She calculates that Mrs. Prokocimer's upper bound cumulative exposure to asbestos from use of JBP is "0.0061 f/cc-yr."(Hollins Aff., pg. 28, para. 81). In preparing the tables, Mrs. Hollins makes assumptions as to the time period and amount of exposure, these were lacking in Mrs. Prokocimer's deposition testimony (Hollins Aff., pg. 28, para. 80, footnotes e, k, m, n, p and q). Ms. Hollins prepares a fourth table "estimating total cumulative ambient asbestos exposure over a 70-year lifetime," which shows that her calculations are within the ATSDR's estimated average of 0.002 to 0.4 f/cc-year due to the number of hours a person spends indoors (Hollins Aff., pgs. 31-32, para. 89). She relies on a series of studies that are not annexed to her affidavit to establish that plaintiff's "exposures to ambient concentrations of asbestos are not associated with a significantly increased incidence of asbestos related disease" (Hollins Aff., pg. 32, para. 90).

Ms. Hollins further reviews reports, testing and studies on asbestos exposure from smoking Kent cigarettes and concludes that Mrs. Prokocimer's use of Kent cigarettes is a likely source of her asbestos exposure. Ms. Hollins further concludes that the talc in JBP did not expose Mrs. Prokocimer to asbestos or cause her pleural mesothelioma. She states that it is also possible that Mrs. Prokocimer's mesothelioma was spontaneous.

Dr. Brent Finley, Ph.D., DABT, has a doctorate in Pharmacology/Toxicology, he is Managing Principal Health Scientist and Executive President of Cardno ChemRisk, a private scientific consulting firm. Dr. Finley is a board certified toxicologist specializing in chemical exposure and human health risk assessment. Dr. Finley did not perform any testing and instead relies exclusively on reports that are not annexed to his affidavit to prepare "Table 1," summarizing the "representative dust and fiber exposure measurement data associated with the consumer application of cosmetic talcum powder"(Finley Aff.,"Table 1," pgs. 28-29 para. 66). "Table 1" calculates a "Hypothetical Airborne Asbestos Concentration(f/cc)" Dr. Finley states that he made assumptions of potential asbestos exposure by relying on the Brown study from 1985, and the FDA asbestos content estimate of "0.1%"(Finley Aff., "Table 1," pgs. 29 para. 66, footnote (b)). Dr. Finley created "Table 2" to determine Mrs. Prokocimer's "estimated personal cumulative exposure" from use of defendants' cosmetic talcum powder products during the years of 1943 to 1983 (Finley Aff. "Table 2,"pgs. 32-33, para. 75). Dr. Finley determines that Mrs. Prokocimer was at most exposed to 0.0015 f/cc-years of asbestos from the use of JBP (See Finley Aff., "Table 2," pgs. 32-33, paras. 75-76). He further concludes that Mrs. Prokocimer's exposure to asbestos from defendant's cosmetic talc products is too low and instead she may have experienced significant cumulative exposure to asbestos from the Kent cigarettes she smoked. (Finley Aff., pg. 37, para. 85).

Gregory B. Diette, M.D., M.H.S., is a medical doctor specializing in pulmonary and internal medicine, with a masters degree in toxicology. He is an attending physician at Johns Hopkins Hospital and Johns Hopkins Bayview Medical Center and a professor in the Division of

Pulmonary and Critical Care, as well as Epidemiology and Environmental Health Sciences. Dr. Diette did not perform any testing and instead relies exclusively on reports or studies conducted by others that are not annexed to his affidavit. Dr. Diette provides a detailed background and employment history for Mrs. Prokocimer. It is unclear where the information was obtained from since defendant only annexed to the motion papers the interrogatory responses and excerpts of her deposition and Dr. Diette does not provide source information (See Mot. Kurland Aff. Exh. Dand E). Dr. Diette discusses pleural thickening, pleural plaques, asbestosis and then concedes that Mrs Prokocimer does not have any of these conditions. He cites to Mrs. Prokocimer's history of cigarette smoking and agrees with Dr. Finley in concluding that the cause of both the lung cancer and the mesothelioma is caused by her smoking of "Kent" cigarettes and potential genetic susceptibility, not JBP.

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in asbestos and the development of asbestos analytical methods. Dr. Sanchez has been employed by a private entity, the RJ Lee Group, Inc., as a Principal Investigator. He states that talc in its purest form is not asbestos. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials is needed to make a determination. He does not state the frequency of testing needed to make a determination and whether the asbestos containing samples would be identified consistently throughout a given location.

Dr. Sanchez's report attempts to address alleged defects in plaintiff's expert reports. The part of the report that attempts to discredit plaintiffs' experts does not make a prima facie showing of lack of causation (see Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516; Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575). Dr. Sanchez cites to reports and studies (most of them are not annexed to his affidavit or the motion papers), his own site visits to Italy and China, and testing of allegedly relevant talcs, and concludes that the defendants' talc, mined in Italy, Vermont and China, does not contain asbestos. Dr. Sanchez ultimately concludes that defendants' talcum powder and the talc used by Mrs. Prokocimer is free of asbestos to a reasonable degree of scientific certainty.

Defendants' have made a prima facie case for summary judgment on plaintiff's first and second causes of action for negligence and strict liability.

Defendants argument that plaintiffs failed to raise an issue of fact because the opposition papers rely on unsworn expert reports that are hearsay, is unavailing. Plaintiffs' unsworn expert reports may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (See Navaraez v. NYRAC, 290 A.D. 2d 400, 737 N.Y.S. 2d 76 [1st Dept., 2002]). Plaintiff submitted other admissible evidence, including Mrs. Prokocimer and her daughter's deposition testimony, Dr. Longo's deposition testimony from a California case, reports and studies (Opp. Exhs. 2,3,10-16,25,43,44-47,49,62,63,65-57,69,77and 3).

Arguments made in defendants' motion papers demonstrate that they were aware of the plaintiff's experts and what their reports stated. The Court can exercise its discretion in considering plaintiff's expert reports in opposition to this motion for summary judgment in the absence of prejudice to the defendant (See Saggese v. Madison Mut. Ins. Co., 294 A.D. 2d 900, 741 N.Y.S. 2d 803 [4th Dept. 2002], CPLR §2001 and Status General Development, Inc. v. 501 Broadway Partners, LLC, 163 A.D. 3d 740, 82 N.Y.S. 3d 34 [2nd Dept., 2018]). Plaintiff e-filed the signed and sworn expert affidavits on October 25, 2018, two days after the Reply Memorandum was uploaded, the day after the motion was submitted in the Submission Part (Room 130), and almost a month before the oral argument on this motion (See NYSCEF Dockets Nos. 267 and 270). Defendants have not shown that they were prejudiced. Plaintiff's expert affidavits will be considered on this motion.

Plaintiff argues that issues of fact remain as to whether Mrs. Prokocimer's exposure to asbestos from JJBP caused her mesothelioma.

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, supra pg. 236, citing to Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]). Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (Id). The *Juni* case applied the Parker v. Mobil Oil Corp., 7 N.Y. 3d 434 and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014], standards for the plaintiff to establish causation to asbestos litigation.

Plaintiff's experts are Dr. Steven P. Compton, Dr. William E. Longo, Dr. Murray Finkelstein and Dr. Jacqueline Moline.

Dr. Steven Compton is a doctor of physics, with laboratory experience in spectroscopy and microscopy. He is also the executive director of MVA Scientific Consultants a private research facility (Opp. Exh. 19). Dr. Compton prepared a report on Italian Talc dated August 1, 2017 in which he confirmed the presence of asbestos after scanning electron and transmission electron microscopy in thirteen samples of the Italian talc provided to the defendants (Opp. Exh. 20). He concluded that aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers (Opp. Exh. 20).

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry (Opp. Exh. 49). Plaintiff provides his report dated 8-2-17 and the "Below the Waist App. of JBP" report dated September of 2017(Opp. Exhs. 50 and 51). Dr. Longo performed studies on samples of the defendants' products and reviewed other reports and studies - most were annexed to the opposition papers - and concluded that there is asbestos in the talc found in defendants products (Exh. 50 and 51). Dr. Longo's "Below the Waist App. of JJBP" report further quantified the amount of asbestos exposure from the use of talc in a manner similar to Mrs. Prokocimer's use, determining that over a period of approximately ten (10) years it results in a mean fiber concentration of 2.57 asbestos fibers/cc in the air samples from the breathing area (Opp. Exh. 51). The combined evidence from Dr. Longo raises an issue of fact as to causation.

Dr. Murray Finkelstein is a medical doctor and a doctor of physics, specializing in environmental exposures to toxins including asbestos (Opp. Exhs. 52 and 53). His reports dated September 5, 2017 and October 16, 2017 address Mrs. Prokocimer's exposure to abestos in both JBP and Kent Cigarettes. He incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of Mrs. Prokocimer's exposure (Opp. Exh. 53). Dr. Finkelstein concludes that plaintiff's exposure to asbestos in both JBP and Kent Cigarettes are substantial contributing causes of her mesothelioma. Dr. Finkelstein's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between Mrs. Prokocimer's exposure to asbestos through her use of talc in defendants' products for many years, and her mesothelioma.

Dr. Jacqueline Moline specializes in occupational and environmental disease specializing in asbestos related occupational medicine. Dr. Moline prepared two reports dated July 17, 2017 and December 6, 2017 (Opp. Exh. 54). Dr. Moline reviewed Mrs. Prokocimer's medical history and deposition testimony. She relies on studies, reports, and OSHA standards, concluding that even small amounts of exposure are sufficient to cause mesothelioma. Dr. Moline concludes that JBP, Giorgio Powder (another manufacturer) and Kent Cigarettes were contaminated with asbestos, that plaintiff's cumulative exposures to all of these products caused her mesothelioma and increased her risk for lung cancer (Opp. Exh. 54).

Defendants arguments that Dr. Moline was discredited in the *Juni* case are unavailing. In the *Juni* case, Dr. Moline testified as to plaintiff's exposure to dust in brakes as part of Mr. Juni's employment. In the *Juni* case, the court determined that the plaintiff was unable to establish causation because of Dr. Moline's lack of knowledge whether the asbestos fibers were active after the braking process (In re New York City Asbestos Litigation (Mary Juni), 148 AD3d 233,

supra, pg. 237). This case is distinguishable, since it does not involve exposure in a commercial setting or to fiction products, but as part of the use of cosmetic talc.

Summary judgment is a drastic remedy that should not be granted where issues raised in conflicting affidavits cannot be resolved. It should not be granted when there is any doubt. The Court's function on summary judgment is issue finding, not issue determination. (Insurance Co. of New York v. Central Mut. Ins. Co., 47 A.D. 3d 469, 850 N.Y.S. 2d 56 [1st Dept., 2008] citing to Millerton Agway Cooperative v.Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]). Conflicting testimony raises credibilty issues, that cannot be resolved on papers. They should be determined by a jury instead, and are a basis to deny summary judgment (Prevost v. One City Block LLC, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017] and Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1st Dept. 2011]).

Defendants' arguments that the specific bottles of their products used by Mrs. Prokocimer were not tested and there is no direct evidence of exposure to asbestos, is not dispositive. Plaintiff is not required to show the precise causes of her damages, but only show facts and conditions from which defendant's liability may be reasonably inferred (Oken v A.C. & S. (*Matter of New York City Asbestos Litig.*), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs as the non-moving party warrants denial of summary judgment sought by the defendants on plaintiff's strict liability and negligence claims. Plaintiff has sufficiently raised credibility issues and issues of fact as to general and specific causation, requiring a trial of this matter.

Plaintiff raised issues of fact as to the punitive damages cause of action. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent plaintiff argues that the defendants placed corporate profits and reputation above the health and safety of Mrs. Prokocimer by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, this issue of punitive damages is to be determined by the trial judge after submission of all evidence.

Plaintiffs did not oppose the summary judgment relief sought by defendants on the causes of action for: (4) premises liability, Labor Law and NYS Industrial Code Violations, (5) liability for contractors and subcontractors, (6) liability for "dust mask" defendants, (8) William S. Prokocimer's claim for loss of consortium and (9) disclaimer of federal jurisdiction. Defendants are entitled to summary judgment on the fourth, fifth, sixth, eighth and ninth causes of action.

Defendants seek summary judgment on the causes of action for both fraud and for breach of express warranty, claiming that plaintiff failed to establish Mrs. Prokocimer's reliance on any fraudulent representations or promises about their products. Defendants argue that there is no implied warranty because plaintiffs cannot provide evidence establishing that JBP was contaminated with asbestos or otherwise defective. Defendants provide excerpts from Mrs. Prokocimer's deposition testimony to prove that she did not rely on advertising, or have any discussions with their representatives, and establish that she did not rely on fraudulent misrepresentations (Mot. Kurland Aff., Exh. D, pgs. 363-395).

A cause of action asserting fraud requires a showing of "a misrepresentation or a material omission of fact which was false, and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"(Genger v. Genger, 152 A.D. 3d 444, 55 N.Y.S. 3d 658 [1st Dept., 2017] and Pasternack v. Laboratory Corp. of America Holdings, 27 N.Y. 3d 817, 59 N.E. 3d 485, 37 N.Y.S. 3d 750 [2016]). A party asserting fraud is required to meet the pleading requirements of CPLR §3016[b], requiring particularity and specificity in their claims. Mere allegations of fraudulent intent are insufficient (New York City Health and Hospitals Corporation v. St. Barnabus Community Health Plan, 22 A.D. 3d 391, 802 N.Y.S. 2d 363 [1st Dept. 2005]).

Plaintiff's cause of action for fraud alleges a material omission of fact resulting from the defendants' suppression and concealment of information about the presence of asbestos in their products (Mot. Kurland Aff., Exh. A). Plaintiff did not provide specificity in support of her allegation of fraud. She failed to make arguments to raise an issue of fact on the unsupported allegations in the complaint. Plaintiffs' cause of action for fraud is dismissed.

Defendants have established a prima facie basis for summary judgment dismissing the part of plaintiff's third cause of action for breach of express warranty. Plaintiff does not claim that she relied on warranties or statements of fact made by the defendants. Mrs. Prokocimer did not identify any written warranties or even written language on the bottles of JBP that she used, other than the name of the product. Mrs. Prokocimer did not state there were any specific promises made to her by the defendants. Defendants correctly argue that plaintiff has not shown justifiable reliance on any representations (See Cecere v. Zep Mfg. Co., 116 A.D. 3d 901, 983 N.Y.S. 2d 846 [2nd Dept., 2014]). The cause of action for breach of express warranty is dismissed.

Implied warranty applies to fitness for the purpose of the allegedly defective products used by Mrs. Prokocimer and that relate to her negligence claims. Plaintiff has established that issues of fact exist as to whether the JBP used by Mrs. Prokocimer was contaminated with asbestos and defective, or unsuited for its purpose (See Denny v. Ford Motor Co., 87 N.Y. 2d 248, 662 N.E. 2d 730, 639 N.Y.S. 2d 250 [1995], Navarez v. Wardsworth, 2018 N.Y. Slip . Op. 06475 [1st Dept.,2018]).

New York does not generally recognize an independent cause of action for civil conspiracy to commit a tort. Allegations of civil conspiracy are only sustainable to connect the actions of separate defendants with an otherwise actionable tort (See Blanco v. Polanco, 116 A.D. 3d 892, 986 N.Y.S. 2d 151 [2nd Dept., 2014] citing to Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y. 2d 968, 503 N.E. 2d 102, 510 N.Y.S. 2d 546 [1986]).

Defendants have stated a prima facies basis to obtain summary judgment on the plaintiffs' seventh cause of action for civil conspiracy and fraud. The plaintiffs' claims of civil conspiracy cannot survive independently after the fraud claims are dismissed on summary judgment.

ACCORDINGLY, it is ORDERED that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint, is granted only to the extent of dismissing the express warranty claim asserted in the third cause of action, the fourth cause of action for premises liability, Labor Law and NYS Industrial Code Violations, the fifth cause of action for liability for contractors and subcontractors, the sixth cause of action for liability for "dust mask" defendants, the seventh cause of action for fraud and civil conspiracy, the eighth cause of action for William S. Prokocimer's loss of consortium, and the ninth cause of action disclaimer of federal jurisdiction, and it is further,

ORDERED that the express warranty claim asserted in the third cause of action, the fourth, fifth, sixth, seventh, eighth and ninth causes of action asserted in the complaint against defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 11, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE