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

EDWARD ROTHLEIN AND SHARON ROTHLEIN,

Plaintiff(s),

- against -

AMERICAN INTERNATIONAL INDUSTRIES, *et al.*,

Defendants.

INDEX NO.	190374/2016
MOTION DATE	11/28/2018
MOTION SEQ. NO.	003
MOTION CAL. NO.	

The following papers, numbered 1 to 11 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 - 7
Answering Affidavits — Exhibits	8 - 10
Replying Affidavits	11

Cross-Motion: ☐ Yes X No

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, ninth and tenth causes of action. The remainder of the relief sought is denied.

Plaintiff, Edward Rothlein, was diagnosed with peritoneal mesothelioma on or about October of 2016. He was born on June 10, 1946 and is approximately 72 years old. Plaintiff alleges he was exposed to asbestos in a variety of ways. His 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"). Mr. Rothlein alleges that he was exposed to the asbestos in JBP from about 1946 to 1964, and from about 1973 to 2016.

At his deposition Mr. Rothlein testified that his mother used JBP on him daily as a child after his bath and to prevent diaper rash until he was about six years old. After his bath, his mother would shake the JBP bottle like a salt shaker pouring the powder into her hand and rubbed it all over his body. The powder would go up in the air as it was applied (Opp. Exh. 3, pgs. 27-28). Mr. Rothlein would used JBP on himself starting when he was around six years old, shaking the container a couple of times to pour the powder into his hands and then rubbed it around his body, in the same manner as his mother. The JBP would create dust that he breathed in (Opp. Exh. 2, pgs. 339-340 and 351, Opp. Exh. 3, pg. 30). Mr. Rothlien testified that from 1952 to 1964 he used some JBP occasionally if he was perspiring or if he came out of the bath and was just patting himself quickly (Mot. Kurland Aff., Exh. C, pgs. 157-158). Plaintiff testified that when he was in college between 1964 and 1968, he stopped using JBP completely and only used another manufacturer's face powder when shaving (Mot. Kurland Aff., Exh. C., pgs. 157-161). Mr. Rothlein only used JBP on himself about one to two dozen times from 1979 to 2016 (Opp. Exh. 2, pgs. 361-362). He did not read the bottle of JBP and could not recall any words on the packaging other than the name of the product. He did not know whether the JBP he used on his children had talc or corn starch in it (Opp. Exh. 2, pgs. 341-342, 344, 354-355 and 355-357).

Mr. Rothlein testified that when Jennifer, his first child, was born in 1973, he once again used the JBP on a daily basis. His mother instructed Mr. Rothlein to shake the bottle about six times and to use his hands to rub the powder on his daughter. His mother also instructed him to use JBP to prevent his daughter from getting diaper rash. He would use JBP to powder his

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

daughter several times a day after bathing and changing her diaper (Opp. Exh. 2, pgs. 332-336). Plaintiff testified that the JBP created dust as he was powdering his daughter and that he was breathing it in (Opp. Exh. 2, pgs. 351). Mr. Rothlein powdered his daughter in this manner until she was about three years old. He testified that the procedure used to apply JBP to Jennifer was followed after his son, Adam, was born in 1975 until about 1979 (Opp. Exh. 2, pgs. 205, 207 and 356).

Mr. Rothlein's wife and children used JBP in the home. Mrs. Rothlein used JBP exclusively every night starting in 2005 until her husband was diagnosed with mesothelioma in October of 2016 (Mot. Kurland Aff. Exh. C, pg. 228, Opp. Exh. 85, pgs. 101-102 and 105-107). Mr. Rothlein testified that he was present daily when his wife applied the JBP and he would breathe in the powder. He testified that his wife would create a cloud of dust with the powder and you could not see five feet away, the powder would settle onto everything in the room (Opp. Exh. 2, pgs. 361-362 and 464). His daughter Jennifer testified that she used JBP on herself until she moved out of her parents house in 1991 (Opp. Exh. 86, pgs. 74-75). His son Adam testified that he used JBP daily at least until he was nine (9) years old and stopped when he started shaving, somewhere between nine and eighteen years old (Opp. Exh. 87, pg. 84).

Plaintiffs commenced this action on December 8, 2016 to recover for damages resulting from Mr. Rothlein's exposure to asbestos from defendants' products. Plaintiffs' Standard Complaint - incorporated into the Short-Form Complaint - asserts eleven 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) joint and several liability, (9) disclaimer of federal jurisdiction, (10) Sharon Rothlein's loss of consortium, and (11) punitive damages (Mot. Kurland Aff., Exh. A). Defendants answered plaintiff's complaint on January 7, 2017 (Mot. Kurland Aff., Exh. B).

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 Mr. Rothlein was exposed to asbestos from the use of JJBP during the relevant periods of about 1946 to 1964, and from about 1973 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 Mr. Rothlein was not exposed to asbestos through use of their products or that they did not cause his mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. F, H, I, J, K, O,P,Q, R, T, and V), FDA findings in 1976 (Mot. Kurland Aff. Exh. S), and the expert affidavits of Dana M. Hollins, MPH, CIH, Michael K. Peterson, M.E.M., DABT and Mathew S. Sanchez, Ph.D., to establish that Mr. Rothlein was not exposed to asbestos through use of their products or that they did not cause his mesothelioma. Defendants claim that during the periods relevant to Mr. Rothlein's exposure, JBP 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, para. 68, pgs. 20 and 21). A third table was prepared applying specifically to Mr. Rothlein's potential exposure to JBP, relying on the same data as the other two tables (Hollins Aff., pgs. 23-25, para. 76, Table 3). She calculates that Mr. Rothlein's upper bound cumulative exposure to asbestos from use of JBP is "0.0044 f/cc-yr."(Hollins Aff., pg. 25, para. 77). In preparing the tables, Mrs. Hollins makes estimates and assumption as to the time period and amount of exposure, these were lacking in Mr. Rothlein's deposition testimony (Hollins Aff., pgs. 24-25, para. 76, footnotes e, f, o and s). Ms. Hollins concludes that the talc in JBP did not expose Mr. Rothlein to asbestos or cause his peritoneal mesothelioma.

Michael K. Peterson, M.E.M., DABT, has a Master's degree in Environmental Management with emphasis on risk assessment and environmental toxicology, and is board certified in toxicology. He is a principal scientist at Gradient, a private environmental consulting firm. Mr. Peterson determines that exposure studies have demonstrated the application of cosmetic talc can liberate measureable levels in the breathing zone of both the user and bystander, but that human epidemiologic data is lacking to specifically evaluate the relationship between exposure to cosmetic talc and the risk of mesothelioma in consumers(Peterson Aff., pg. 10, para. 43). He states that there is no human or animal evidence that cosmetic talc causes mesothelioma (Peterson Aff. , pg. 11, para. 47). Mr. Peterson states that there is no evidence that cosmetic talc, including that found in the defendants' products, causes mesothelioma (Peterson Aff., pgs. 15-16, para. 58). He cites to his own report and a series of others - not all of which are annexed to the motion papers - stating that "In men, 40-70% of peritoneal mesothelioma cases are estimated to be non-asbestos related" (Peter Aff., pg. 18 -19, para. 65). Mr. Peterson concludes that Mr. Rothlien's peritoneal mesothelioma was not caused by exposure to asbestos or the defendants' products, but was "most likely" "of spontaneous origin" (Peterson Aff., pg. 19, paras. 66 and 67).

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 from the source mines are 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 Mr. Rothlein, Mrs. Rothlein and their children's deposition testimony, Dr. Longo's deposition testimony from a California case, reports and studies (Opp. Exhs. 1-3,10-16,25,43,46-48, 50,62,63,65-67,85,86 and 87).

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 November 26, 2018, two days before the motion was argued and submitted. 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 Mr. Rothlein's exposure to asbestos from JBP caused his peritoneal 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 Mr. Rothlein'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. 53 and 54). His report dated September 14, 2017 addresses Mr. Rothlein's exposure to abestos in cosmetic talc products including JBP and from his work on Bendix brakes on his cars from the 1970s and early 1980s. He incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of Mr. Rothlein's exposure (Opp. Exh. 54). Dr. Finkelstein concludes that plaintiff's exposure to asbestos in cosmetic talc products, including JBP, was a substantial contributing cause of Mr. Rothlein's peritoneal mesothelioma. Dr. Finkelstein's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between Mr. Rothlein's exposure to asbestos through his use of talc in defendants' products for many years, and his peritoneal mesothelioma.

Dr. Jacqueline Moline specializes in occupational and environmental disease specializing in asbestos related occupational medicine. Dr. Moline reviewed Mr. Rothlein's medical history and deposition testimony and concludes that his peritoneal mesothelioma is a result of cumulative exposure to JBP and work on vehicular brakes. She relies on studies and reports, concluding that even small amounts of exposure to asbestos are sufficient to cause mesothelioma (Opp. Exh. 42).

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 Mr. Rothlein 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 Mr. Rothlein 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, (9) disclaimer of federal jurisdiction and (10) Sharon Rothlein's loss of consortium. Defendants are entitled to summary judgment on the fourth, fifth, sixth, eighth, ninth and tenth causes of action.

Defendants seek summary judgment on the part of the third cause of action for breach of warranty, claiming that plaintiff failed to establish Mr. Rothlein's reliance on any express warranty because he did not testify as to 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 Mr. Rothlein's deposition testimony to prove that he did not rely on advertising, or have any discussions with their representatives, and establish that he did not rely on fraudulent misrepresentations.

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 he relied on warranties or statements of fact made by the defendants. Mr. Rothlein did not identify any written warranties, or even written language on the bottles of JBP that he used, other than the name of the product. Mr. Rothlein did not state there were any specific promises made to him by the defendants. Defendants correctly argue that plaintiffs have 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 defendants' allegedly defective products used by Mr. Rothlein that relate to his negligence claims. Plaintiffs have established that issues of fact exist as to whether the JBP used by Mr. Rothlein 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, 165 A.D. 3d 407, 84 N.Y.S. 3d 479 [1st Dept.,2018]).

Plaintiffs' seventh cause of action alleging fraud and civil conspiracy. The claim of fraud relies on 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).

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]).

Plaintiffs failed to make arguments to raise an issue of fact on the unsupported allegations in the complaint. They did not provide specificity in support of the allegations of fraud in the seventh cause of action.

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 joint and severable liability, the ninth cause of action form disclaimer of federal jurisdiction, and the tenth cause of action for loss of consortium and it is further,

ORDERED that the express warranty claim asserted in the third cause of action, the fourth, fifth, sixth, seventh, eighth, ninth and tenth 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 14, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
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