SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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SANDRA SMITH, Individually and as Executrix of the Estate of MARK SMITH,

Plaintiff,

- v -

ASHLAND, INC.,ATLANTIC TRADING & MARKETING, INC.,BRIDGEVIEW AEROSOL, LLC SUCCESSOR IN INTEREST TO HYDROSOL, INC.,CHICAGO AEROSOL, LLC SUCCESSOR IN INTEREST TO BRIDGEVIEW AEROSOL, LLC AND HYDROSOL, INC.,GEORGE E. WARREN CORPORATION, GULF OIL LIMITED PARTNERSHIP, HYDROSOL, INC.,MORGAN STANLEY CAPITAL GROUP INC.,TEXACO, INC.,UNION OIL COMPANY OF CALIFORNIA D/B/A UNOCAL AND AMSCO, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO AMERICAN MINERAL SPIRITS COMPANY A/K/A AMSCO, UNIVAR USA, INC. F/K/A CHEMCENTRAL CORP., AND VAN WATERS & RODGERS, INC.,SAFETY - KLEEN SYSTEMS, INC.,CHEVRON U.S.A. INC. AS SUCCESSOR IN INTEREST TO GULF OIL COMPANY, CONOCOPHILLIPS COMPANY, CRC INDUSTRIES, INC.,EL PASO MERCHANT ENERGY-PETROLEUM COMPANY, EXXONMOBIL CORPORATION, ILLINOIS TOOL WORKS INC.,D/B/A PERMATEX AND D/B/A GUMOUT AND D/B/A LPS LABORATORIES AND D/B/A WYNN'S, RADIATOR SPECIALTY COMPANY, SAFETY-KLEEN SYSTEMS, INC.,SHELL OIL COMPANY, SUNOCO, INC. (R&M) F/K/A SUN COMPANY, INC. AND F/K/A SUN OIL COMPANY, INC.,THE BERKEBILE OIL COMPANY, INC.,THE SHERWIN-WILLIAMS COMPANY, UNITED STATES STEEL CORPORATION

Defendants.

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INDEX NO. 156780/2017

MOTION DATE 09/06/2018

MOTION SEQ. NO. 011

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 011) 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 274, 286, 287, 288, 289, 290, 291, 292, 294, 305, 327, 328, 329, 330, 331, 332

were read on this motion to/for DISMISSAL

The motion by defendants Chevron U.S.A. Inc., Texaco, Inc. and Union Oil Company of California d/b/a Unocal ("Moving Defendants") to dismiss the second cause of action (breach of

implied warranty), the fourth cause of action (fraudulent misrepresentation) and the punitive damages asserted in the Second Amended Verified Complaint[1] is denied.

Background

Mark Smith was a mechanic on Long Island from 1970 to 2016. During that time, plaintiff alleges that Mr. Smith was exposed to products containing benzene and that this led him to contract Myelodysplastic Syndromes ("MDS")— an illness that took his life on June 7, 2018. Plaintiff, Mr. Smith's widow, alleges that defendants failed to warn Mr. Smith about the known dangers of using products containing benzene. Plaintiff claims that defendants comprise the entire industry that manufactures products containing benzene and insists that they had the capacity to reduce or eliminate the effects of benzene.

The Moving Defendants move to dismiss on behalf of all defendants. They claim that plaintiff cannot plead a cause of action for fraud because the pleading does not articulate reasonable reliance. The Moving Defendants insist that plaintiff's deposition testimony, from an action brought in Pennsylvania, establishes that Mr. Smith knew that products contained benzene, that benzene could potentially cause MDS, and that he would not have read warning labels if the products had contained such warnings.

The Moving Defendants also claim that the breach of warranty claim should be dismissed because the products at issue were fit for their ordinary purpose. They also make statute of limitations arguments with respect to both the fraud and the breach of warranty claims.

[1] After this motion was filed, the parties stipulated that plaintiff could amend the complaint (*see* NYSCEF Doc. No. 336 [Third Amended Verified Complaint]). The Court observes that the causes of action at issue in this motion contain identical allegations and paragraph numbers in both the Second and Third Amended Complaint.

In opposition, plaintiff claims that she has stated a cause of action for fraud and breach of implied warranty and maintains that the Moving Defendants have mischaracterized Mr. Smith's deposition testimony. Plaintiff emphasizes that later in the deposition, Mr. Smith claimed he would have read the warning labels if they were included on a product.

Discussion

"When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

"[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010] [observing that affidavits and deposition testimony are not documentary evidence under CPLR 3211(a)(1)]).

Fraudulent Misrepresentation

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege 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" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011][internal quotations and citations omitted]).

Here, plaintiff states a cause of action for fraudulent misrepresentation. Plaintiff claims that defendants knew benzene was harmful and that they prevented disclosure of information that would reveal the harmful effects of benzene (NYSCEF Doc. No. 336, ¶ 74). Plaintiff also alleges how individual defendants purportedly obtained information about the harmful effects of benzene (*id.* ¶¶ 75-136). Plaintiff contends that Mr. Smith "and others around him relied upon the fraudulent representations, misrepresentations and omissions made by the Defendants and did so to the Plaintiff's Decedent's detriment causing harmful benzene exposure and injury" (*id.* ¶ 146).

The Moving Defendants claim that paragraph 146 is the only allegation about reliance and it is not enough to state a cause of action. Obviously, reviewing this single paragraph in isolation might support the Moving Defendants' position that it is conclusory. But the Third Amended Complaint contends that the Moving Defendants actively sought to conceal the harmful effects of benzene, that Mr. Smith used products containing benzene and that he eventually contracted MDS because he used those products. The reliance element is clear—Mr. Smith used products with the expectation that the Moving Defendants would not hide crucial information about potential safety hazards. The purpose of requiring plaintiffs to plead fraud

with particularity is to put defendants on notice of "the circumstances constituting the wrong" (CPLR 3016[b]). Plaintiff did that here.

With respect to Mr. Smith's Pennsylvania deposition testimony, the Court finds that it does not constitute documentary evidence utterly refuting his fraudulent misrepresentation claim. Although plaintiff testified that he did not read warning labels (*see* Mr. Smith's tr at 66-67, 126-127, 184-85), he also testified that when first using a product he would read the label (*id.* at 370, 371). The Court recognizes that Mr. Smith's answers were different when responding to questions posed by his attorney. But this is a motion to dismiss and the Court cannot make a credibility determination at this stage of the proceedings even if the Court were able to find that deposition testimony could constitute documentary evidence (*see Fontanetta*, 73 AD3d at 86 [finding that deposition testimony was not documentary evidence]).

The Court also denies the Moving Defendants' motion to the extent that they argue that the fraudulent misrepresentation claim is barred by the statute of limitations. The Moving Defendants contend that Mr. Smith testified that his father, who passed away in 2005, told him at some point that working with "chemicals will kill you" (Mr. Smith's tr at 126). That nonspecific advice from his father (who was also a mechanic) does not constitute knowledge that caused the statute of limitations to run. At best, it gave Mr. Smith a general warning (decades after he started working as a mechanic) that there *might* be some harmful effects from certain products. And, as pointed out by plaintiff, the statute of limitations began to run from discovery of Mr. Smith's illness (*see* CPLR 214-c[2]; *see also Matter of New York County DES Litig.*, 89 NY2d 506, 513, 655 NYS2d 862 (1997).

Breach of Implied Warranty

A claim for breach of implied warranty brought under UCC 2-314(2)(c) "may be had upon a showing that the product was not minimally safe for its expected purpose—without regard to the feasibility of alternative designs or the manufacturer's 'reasonableness' in marketing it in that unsafe condition" (*Denny v Ford Motor Co.*, 87 NY2d 248, 259, 639 NYS2d 250 [1995]).

The Moving Defendants contend that plaintiff cannot state a cause of action for breach of implied warranty because the products were fit for their ordinary purpose. They point out that some of the products, such as gasoline, is commonly used for cars and machines. The Moving Defendants also argue that the products need not be perfectly safe—they simply need to have a minimal level of quality with respect to their intended use.

In opposition, plaintiff insists that the products were not fit for their ordinary purpose because they are unsafe. Plaintiff argues that the products were not safe to use in Mr. Smith's work as a mechanic, the products did not contain adequate warnings about their dangers and these hazards eventually caused Mr. Smith's to contract MDS.

Plaintiff has stated a cause of action for breach of implied warranty—the Third Amended Complaint alleges that the products were not fit because they were not safe and that defendants failed to train, warn, or develop alternative products that did not contain benzene (NYSCEF Doc. No. 336, ¶ 57). Plaintiff alleges that the ordinary and foreseeable use of these products was intrinsically dangerous (*id.*) The fact is that the products could not be fit for their ordinary purpose if plaintiff proves, as alleged in the Third Amended Complaint, that these products were extremely dangerous and unsafe.

With respect to the statute of limitations argument, plaintiff maintains that "It is unclear at this time which products Mark Smith used in the four years prior to the filing of his case" and that plaintiff should be afforded the chance to do discovery (NYSCEF Doc. No. 286 at 20). The Court agrees—discovery may reveal that Mr. Smith only used certain products within the four-year statute of limitations. But plaintiff need not establish which products were used on a motion to dismiss. That, of course, is the purpose of the discovery process.

Punitive Damages

The Moving Defendants also seek to dismiss plaintiff's claim for punitive damages. They insist that plaintiff's allegation that defendants should be held liable for Mr. Smith's injuries on the basis of market share liability precludes the availability of punitive damages.

In opposition, plaintiff asserts that both the gross negligence and fraudulent misrepresentation causes of action support a claim for punitive damages. Plaintiff acknowledges that although she "included some language in the complaint which references market share, all causes of action, including the causes of action for gross negligence and fraudulent misrepresentation are alleged with regard to each Defendant individually" (NYSCEF Doc. No. 286 at 23-24. Plaintiff admits that she must prove liability against each defendant and that market share claims were not relied upon as a basis to seek punitive damages.

Plaintiff has stated allegations that could support a claim for punitive damages. Certainly, plaintiff does include "market share" liability language in the operative pleading (*see* NYSCEF Doc. No. 336 ¶ 39). But that paragraphs states that defendants should be held liable "on the basis *of at least* the proportionate share of the relevant market" (*id.* [emphasis added]). The pleading does not state that is plaintiff's only basis for recovery from defendants; in fact, the

complaint includes allegations about the purported wrongdoing of each individual defendant (*see e.g., id.* ¶¶ 4- 27).

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied and the parties are directed to answer pursuant to the preliminary conference order dated September 6, 2018 (NYSCEF Doc. No. 335).

Next Conference: 1-15-2019 at 2:15 p.m.

9/26/18
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE