

Niemeyer v Brenntag N. Am., Inc.

2018 NY Slip Op 32803(U)

November 1, 2018

Supreme Court, New York County

Docket Number: 190156/2017

Judge: Manuel J. Mendez

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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
SHIRLEY NIEMEYER,

Plaintiff(s),	INDEX NO.	<u>190156/2017</u>
- against -	MOTION DATE	<u>10/24/2018</u>
BRENTAG NORTH AMERICA, INC., et al.,	MOTION SEQ. NO.	<u>003</u>
Defendants.	MOTION CAL. NO.	<u> </u>

The following papers, numbered 1 to 5 were read on Colgate-Palmolive Company's motion to dismiss:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 2</u>
Answering Affidavits — Exhibits _____	<u>3 - 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Colgate-Palmolive Company's ("Colgate") motion pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiff's Amended Complaint and, alternatively, dismissing the Amended Complaint's causes of action for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud is granted to the extent that Plaintiff's causes of actions for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud are dismissed.

Plaintiff, Shirley Niemeyer, diagnosed with mesothelioma in January 28, 2015, commenced this action on April 27, 2017 to recover for injuries sustained from her asbestos exposure (Opposition Papers Exhs. A and D). Mrs. Niemeyer alleges that she was exposed to asbestos from Cashmere Bouquet cosmetic talc when she used it and when she was in close proximity to others when they were using the product (Id. Exh. D at 15, Answer 20). She alleges that she began using Cashmere Bouquet when she was approximately 10 years old and continued using it into her adulthood (Id). She further alleges that her siblings used Cashmere Bouquet and that she applied it on her bed and her siblings' beds (Id). On May 24, 2018 Mrs. Niemeyer filed an amended complaint ("Amended Complaint"), asserting five new claims (Id. Exh. C).

Colgate now moves pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiff's Amended Complaint. It contends that Plaintiff's new claims are time-barred under CPLR §214-c(2)'s three-year statute of limitations. Colgate also contends that Plaintiff did not seek leave to file the Amended Complaint and that it is prejudiced by the amendment. It further contends that the Amended Complaint should be dismissed because it states new causes of action which are not predicated on new factual allegations when discovery has already taken place.

Plaintiff opposes Colgate's motion. She contends that the Amended Complaint complies with New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO") and NYCAL's long-standing practice to permit amended complaints without leave of court. Additionally, Plaintiff contends that Colgate is not prejudiced. Lastly, Plaintiff withdraws the Amended Complaint's

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

Fourth Count for Premises Liability, Labor Law, and NYS Industrial Code Violations; Fifth Count for Contractors and Sub-Contractors Liability; and Sixth Count for Liability for "Dust Mask" Defendants (Plaintiff Aff. at 1, para. 3).

"On a motion to dismiss pursuant to CPLR §3211, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible inference and determine only whether the facts as alleged fall within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp. 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR §3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways: on the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law; on the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action (Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 980 N.Y.S.2d 21 [1st Dept. 2014]).

Colgate's argument that Plaintiff's Amended Complaint should be dismissed because Plaintiff did not seek leave of court is unavailing. The CMO provides that the Plaintiff may amend her complaint as of right. Specifically, it states that "[a]ny plaintiff may, without further leave of the Court, amend her complaint, subject to the limitations stated in this CMO" (CMO §VII (B)). Such limitations exist when (1) a Plaintiff seeks to add a claim for punitive damages and (2) when a Plaintiff seeks to move an action from the deferred docket to the active or accelerated docket (see Id. §VII.C and §XVI.A). Because these situations are not present here, Plaintiff's complaint was properly amended.

Colgate contends that Plaintiff's Breach of Warranty claim is time-barred because Plaintiff failed to assert this claim within UCC §2-725's four-year statute of limitation. Colgate further contends that the Plaintiff cannot revive this claim under the Toxic Tort Revival Statute because warranty claims are based on breach of contract, and not on tort. Thus, Colgate contends that the Toxic Tort Revival statute is not a basis to resurrect Plaintiff's warranty claim.

Plaintiff's claim for Breach of Warranty is time-barred under the UCC §2-725. UCC §2-725 provides that "(1) [a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued ... and (2) [a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge." Plaintiff's answers to interrogatories and deposition do not establish that her Breach of Warranty claim falls within the UCC §2-725's four-year statute of limitations (see Opposition Papers Exh. D and Niemeyer Dep. at 122-123). Thus, pursuant to UCC §2-725's four-year statute of limitation, Plaintiff's Breach of Warranty claim is untimely.

Plaintiff cannot revive her Breach of Warranty claim under the Toxic Tort Revival Act. The Toxic Tort Revival Act was codified under CPLR §214-c. Specifically, "[i]n 1986, the Legislature enacted chapter 682 of the Laws of 1986, which amended the CPLR to add section 214-c to replace the exposure rule with a balanced and more equitable discovery accrual mechanism (CPLR 214-c [2]). It also allowed for a limited revival of foreclosed claims (L 1986, ch 682, § 4) (Rothstein v. Tennessee Gas Pipeline Co., 87 N.Y.2d 90, 661 N.E.2d 146, 637 N.Y.S.2d [1995]). Colgate's argument that Plaintiff cannot revive her Breach of Warranty claim under the Toxic Tort Revival Act is correct. Nowhere does CPLR §214-c's language revive Breach of Warranty claims, or any claim of a contractual nature. The plain language of the statute indicates that CPLR §214-c is limited to claims for personal injury and property damage (see CPLR §214-c(2)). Thus, Plaintiff's Breach of Warranty claim is dismissed.

Colgate contends that the Amended Complaint's Seventh Count for Civil Conspiracy and Fraud should be dismissed because they are not properly pled. It also contends that these causes of actions find no factual support in Plaintiff's Initial or Amended Complaint.

CPLR §3016(b) states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." "To make out a cause of action for fraud, ... 'a party must allege representation of a material existing fact, falsity, scienter, deception and injury" (Megaris Furs, Inc. v. Gimbel Bros., Inc., 172 A.D.2d 209, 568 N.Y.S.2d 581 [1st Dept. 1991] citing Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 [1919]). "Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016(b), which requires, in the case of a cause of action based on fraud, that 'the circumstances constituting the wrong shall be stated in detail'" (Id). "[M]ere conclusory language, absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic Nat. Title Ins. Co. v. Cardinal Abstract Corp., 14 A.D.3d 678, 790 N.Y.S.2d 143 [2nd Dept. 2005]).

Plaintiff's Initial Complaint failed to plead fraud with CPLR §3016(b)'s required specificity. Plaintiff's Amended Complaint does not plead fraud with CPLR §3016(b)'s requisite specificity (see Amended Complaint at 19-21). The allegations in Plaintiff's Amended Complaint are conclusory, they do not identify Colgate, nor do they state Colgate's role in the alleged fraudulent conspiracy. Furthermore, Plaintiff's Initial Complaint does not assert factual allegations to sustain a claim for fraud (Opposition Papers Exh. A). Because Plaintiff pled fraud generally, as to "all defendants" (Id. at 20), the Amended Complaint does not meet CPLR §3016(b)'s requisite level of specificity, and thus fails to state a claim for fraud.

Plaintiff fails to state a claim for civil conspiracy. New York does not recognize civil conspiracy to commit a tort as an independent cause of action (Sokol v. Addison, 293 A.D.2d 600, 742 N.Y.S.2d 311 [2nd Dept. 2002]). To "establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (Abacus Fed. Sav. Bank v. Lim, 75 A.D. 3d 472, 905 N.Y.S. 2d 585 [1st Dept. 2010] citing World Wrestling Fedn. Entertainment, Inc. v. Bozell, 142 F. Supp. 2d 514, 532 [SD NY 2001]). "[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort (Romano v. Romano, A.D.3d 767 N.Y.S.2d 841 [2nd Dept. 2003]). Here, because Plaintiff's underlying Fraud claim fails, Plaintiff's claim for Civil Conspiracy also fails. Therefore, it is dismissed.

Plaintiff opposes Colgate's motion. She contends that her Initial Summons and Complaint pled allegations that gave Colgate notice of her Third Count for Breach of Warranty, and thus it relates back to the Initial Complaint. This argument is unavailing. The fact that Plaintiff's Initial Complaint pled facts that alleged a Breach of Warranty claim (see Opposition Papers Exh. A 20) does not save Plaintiff's claim from being dismissed under the statute of limitations. As stated above, Plaintiff's Breach of Warranty claim is time-barred. Plaintiff has not established that its claim falls within the UCC §2-725's statute of limitations. Additionally, a Breach of Warranty claim is contractual in nature, and thus has no basis for revival under CPLR §214-c. In any case, Plaintiff shows no opposition to Colgate's argument on this point. Therefore, Plaintiff's Breach of Warranty claim is dismissed.

Plaintiff contends that its Initial Summons and Complaint pled allegations that gave Colgate notice of their Seventh Count for Civil Conspiracy and Fraud and that these claims are premised upon the same subject matter alleged in the Initial Complaint. This argument is also unavailing. Plaintiff's Fraud claim is not pled with specificity, neither in the Initial Complaint nor in the Amended Complaint. Moreover, the fact that Plaintiff pled allegations in the Initial Complaint that gave Colgate notice of their Fraud claim is irrelevant to Plaintiff's failure to meet CPLR §3016(b)'s level of specificity. Because Plaintiff does not meet this threshold, her complaint fails to state a cause of action for fraud. Plaintiff's Civil Conspiracy claim is dismissed because it cannot stand alone. Lastly, Plaintiff has withdrawn her causes of action for Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, and Liability for Dust Mask Defendants.

ACCORDINGLY, it is ORDERED that Defendant Colgate-Palmolive Company's ("Colgate") motion pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiff's Amended complaint and, alternatively, dismissing the Amended Complaint's causes of action for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud is granted to the extent that Plaintiff's causes of actions for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud are severed and dismissed, and it is further,

ORDERED that the Defendant Colgate-Palmolive Company serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: November 1, 2018

MANUEL J. MENDEZ
J.S.C.
MANUEL J. MENDEZ
J.S.C.

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