Matter of Olson v Brenntag N. Am., Inc.
2018 NY Slip Op 32885(U)
November 9, 2018
Supreme Court, New York County
Docket Number: 190328/2017
Judge: Manuel J. Mendez

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

DONNA A. OLSON and ROBERT M. OLSON,

Plaintiffs,

- against -

BRENNTAG NORTH AMERICA, INC., *et al.*,

Defendants.

INDEX NO. 190328/2017

MOTION DATE 10/24/2018

MOTION SEQ. NO. 001

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

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, Donna A. Olson, was diagnosed with pleural mesothelioma on or about May of 2016. She alleges that she has no known asbestos exposure except from the use of talcum powder products. Her exposure - as relevant to this motion - is allegedly from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson & Johnson Baby Powder ("JJBP") and Shower to Shower. Mrs. Olson alleges that she used the defendants' products daily from 1953 to 2015.

At her deposition Mrs. Olson testified that her mother used JJBP after her daily baths, and an additional one or two times a day in the summer, from when she was born in 1953 until she was eight years old (Mot. Kurland Aff. Exh. C, pg. 9, 163, 171, 178 - 179). There is deposition testimony that at eight years old through her marriage Mrs. Olson continued the practice of powdering herself with JJBP daily, after her bath, applying it directly on her chest and putting some in her hands to apply under her arms. Whenever she applied this product she shook the bottle a total of three or four times (Mot. Kurland Aff., pgs. 171, 183-184, 195 -196, Exh. D pg. 104). Plaintiff testified that her mother, and later she, in applying the JJBP would create a cloud of dust in the air that she breathed in (*Id.*, pg. 170, 355 -356). Mrs. Olson testified that when she was twelve or thirteen JJBP changed from a tin container to a plastic one, that she read the ingredients on the label of the container which she recalls included "talc, " and that there were no warnings on it (Mot. Kurland Aff., Exh. C, pgs. 185, 187-189). Mrs. Olson claims that she used JJBP on her daughter daily from the day she was born in 1991 until she was eight years old (Mot. Kurland Aff., Exh. C, pgs. 35-26, 213-214).

Mrs. Olson testified that from approximately 1995 through 2015 she switched products and used Shower to Shower on herself after daily baths in the same manner as JJBP. She claims there were no warnings on the Shower to Shower ingredients label (Mot. Kurland Aff., Exh.C, pgs. 203-205, 210). Mrs. Olson testified that she stopped using Shower to Shower in 2015 when she heard about a possible link to ovarian cancer (Mot. Kurland Aff., Exh. C, pgs. 210-211).

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

Plaintiffs commenced this action on October 19, 2017 to recover for damages resulting from Mrs. Olson's exposure to asbestos. 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 severable liability, (9) disclaimer of federal jurisdiction, (10) Robert M. Olson's claim for loss of consortium, and (11) punitive damages (Mot. Kurland Aff., Exh. A).

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 nonmoving 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' argument that plaintiffs will not present any admissible evidence of exposure to asbestos, is unavailing.

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. Olson 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. Olson was exposed to asbestos from the use of JJBP or Shower to Shower during the relevant period of 1953 - 2015 fails to establish a prima facie basis to obtain summary judgment.

Defendants apply the standards asserted in, In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept., 2017], and 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]), 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. Olson was not exposed to asbestos through use of their products or that they caused her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. F, H, I, J K, O,P, Q and R), FDA findings in 1976 (Mot. Kurland Aff. Exh. S), and the expert affidavits of Dana M.

Hollins, MPH, CIH, Michael K. Peterson, MEM, DABT and Mathew S. Sanchez, Ph.D..

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers, and concludes cosmetic-grade talc has not been shown to be a risk factor for mesothelioma.

Ms. Hollins alleges that starting from the 1970's there are "numerous" published and unpublished studies that allegedly evaluate "airborne exposures (*to asbestos*) from dust or fiber in cosmetic talc powder products." She relies on six (6) publications and two unpublished studies for the preparation of two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products (1) over a period of two years and (2) over a 70 year lifetime (Hollins Aff. Table 1 and Table 2, pgs. 17 and 18). A third table was prepared applying specifically to Mrs. Olson's potential exposure to JJ talcum powder products, relying on the same data as the other two tables (Hollins Aff., pgs. 22-23, para. 67, Table 3). She calculates that Mrs. Olson's upper bound cumulative exposure to asbestos from use of JJ talcum powder is "0.0053 f/cc-yr."(Hollins Aff., pg. 23, para. 68). The third table has footnotes where Ms. Hollins "assumed" the time period and amount of exposure where it was lacking in Mrs. Olson's deposition testimony (Hollins Aff., pg. 23, para. 67, footnotes 8, h, p,q and s). Ms. Hollins concedes that she made no evaluation for an alleged "latency"period of "10 years" prior to Mrs. Olson's diagnosis (Hollins Aff.,pg. 18., para.61).

Ms. Hollin's affidavit fails to "unequivocably" establish lack of causation or meet defendants' prima facie burden. Her reliance on studies and unpublished reports that are not annexed to her affidavit, her failure to establish a scientific foundation for the type of methodology used in creating the tables, including the missing ten year "latency" period and the assumptions that were made as to Mrs. Olson's time periods of exposure indicated in the footnotes as part of the calculations, fails to establish lack of causation. The reliance on speculation and conjecture where exposure to a toxin can be "difficult or impossible to pinpoint with an exact numerical value" does not create "unequivocal" proof as to defendants' products lack of contribution to causation of Mrs. Olson's mesothelioma (see Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2006], Sean R. ex rel. Debra R. v BMW of North America, LLC, 26 NY3d 801,supra, and DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, supra).

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 relies on studies applying to animal toxicology and concludes that the evidence from animal studies does not support a finding of carinogenicity of talc, inhaled or otherwise. Mr. Peterson's statement that human epidemiologic data is lacking to specifically evaluate the relationship between exposure to cosmetic talc and the risk of mesothelioma in consumers, contradicts Ms. Hollins reference to "numerous" published and unpublished studies that allegedly evaluate "airborne exposures (*to asbestos*) from dust or fiber in cosmetic talc powder products." (Peterson Aff., pg. 10, para. 43).

Mr. Peterson, citing to no specific study, states that the recorded cases of pleural mesothelioma is unique to industrial talc. Mr. Peterson considers the level of talc dust exposure and concentrations to be greater in talc miners and millers over consumer exposure (Peterson Aff., pg. 11, para. 45). Mr. Peterson states that there has been no definitive evidence that asbestos exists in cosmetic talc, including the defendants' products, and determinations to the contrary rely on misconceptions. He concludes that Mrs. Olsen's mesothelioma was not caused by exposure to asbestos or the defendants' products, but was "most likely" "of spontaneous origin" (Peterson Aff., pg. 18-19, paras. 66 and 67).

Mr. Peterson's affidavit fails to meet the foundational standards, or defendants' prima facie burden as to causation, under Sean R. ex rel. Debra R. v BMW of North America, LLC, 26 NY3d 801,supra and In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, supra. The conclusions in Mr. Peterson's affidavit are speculative and conclusory. He failed to provide

any mathematical modeling analysis, taking into account Mrs. Olson's actual exposure to cosmetic talc, to establish lack of causation. His report fails to state the scientific basis for his conclusion that Mrs. Olson's mesothelioma is "most likely" of "spontaneous origin" and non-asbestos-related. Mr. Peterson does not state which of Mrs. Olson's case materials he reviewed, he does not identify Mrs. Olson's family history, or provide other proof to establish that Mrs. Olson was genetically predisposed to contracting mesothelioma without asbestos exposure (Romano v Stanley, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 589 [1997] and Guzman ex. rel. Jones v. 4030 Bronx Blvd. Associates L.L.C., 54 A.D. 3d 42, 861 N.Y.S. 2d 298 [1st Dept. 2008]).

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in characterizing asbestos and the development of asbestos analytical methods. Dr. Sanchez 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 plaintiffs' expert analysis, concluding that their finding of asbestos in talc and defendants' talc products is flawed and relies on non-accepted methodology for detection of asbestos. 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, supra) and Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, supra). He ultimately concludes that defendants' talcum powder and the talc used is free of asbestos to a reasonable degree of scientific certainty. He relies on review, analysis and interpretation of decades of studies conducted by scientists, and his own site visits to Italy and China and testing of allegedly relevant talcs to reach his conclusion.

Dr. Sanchez concludes that the defendants' talc mined in Italy, Vermont and China, does not contain asbestos. Dr. Sanchez's Affidavit fails to make a prima facie showing of lack of causation as to Mrs. Olson. He refers to studies and testing with samples that are not from the period relevant to Mrs. Olson's alleged exposure (ie testing performed by Buzon in 2016 of samples from Guangxi, China, Sanchez aff. pg.15 para. 52), or he fails to show that all of the research was conducted on samples taken from the relevant period. There are reports and studies he cites that are also not annexed to his affidavit or the motion papers (ie his own report dated April 6, 2018), rendering his conclusions speculative (See Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*) , 122 A.D. 3d 520, supra and Lopez v. Fordham Univ., 69 A.D. 3d 532, 894 N.Y.S.2d 389 [1st Dept., 2010]).

Defendants' experts have not "unequivocally" established that their products could not have contributed to the causation of plaintiff's injury to warrant summary judgment on plaintiffs' negligence and strict liability claims (Comeau v W. R. Grace & Co.- Conn. (*In re New York City Asbestos Litig.*), 216 A.D. 2d 79, supra at pg. 80, 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 Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*) , 122 A.D. 3d 520, supra). Defendants did not meet their prima facie burden with the expert affidavits and the additional reports and studies that are included with the motion papers.

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. Defendants did not meet their prima facie burden and there is no need to address the deficiencies in plaintiffs' opposition papers. Alternatively, 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. Olson's deposition testimony, in

opposing the relief sought (Opp. Exhs. 1, 2 and 3). Plaintiffs rely on their experts' reports, Dr. Longo's deposition testimony in another action, studies and reports. Plaintiffs also e-filed the signed and sworn expert affidavits on October 23, 2018, the day before oral argument, with no objections from the defendants at oral argument (See NYSCEF Docket # 158). Defendants have not shown that they were prejudiced or that the plaintiffs' opposition solely relies on hearsay.

Plaintiffs argue that issues of fact remain as to whether Mrs. Olson's exposure to asbestos from JJBP and Shower to Shower 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, supra 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.

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

Dr. Jacqueline Moline specializes in occupational and environmental disease specializing in asbestos related occupational medicine. 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 his employment. Plaintiff had multiple mixed exposures from other products and it was determined she was unable to establish causation because of her 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, because Mrs. Olson alleges she was only exposed to talc through defendants' products. Dr. Moline relies on studies and reports concluding that even small amounts of exposure are sufficient to cause mesothelioma (Opp. Exh. 42, pg 13). She also relies on studies and reports of asbestos in talc from the same regions and mines in Italy, Vermont and China used in defendants' products. Dr. Moline concludes that defendants' products were contaminated with asbestos (Opp. Exh. 42, pgs. 15-17). Dr. Moline's opinions are sufficient to raise an issue of fact on the issue of causation.

Dr. Murray Finkelstein is a medical doctor and a doctor of physics, specializing in environmental exposures to toxins including asbestos (Opp. Exh. 53). His affidavit incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of Donna Olson's exposure (Opp. Exh. 52 (Amended)). Dr. Finkelstein's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between Mrs. Olson's exposure to asbestos - solely through the use of talc in defendants' products for many years - and her mesothelioma.

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). This study is sufficient to raise an issue of fact as to whether asbestos in the Italian talc used by defendants caused Mrs. Olson's mesothelioma.

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry (Opp. Exh.51). Plaintiffs provide his deposition testimony in an asbestos case involving other plaintiffs in California, his report dated 8-2-17 and the "Below the Waist App. of JJBP" report (Opp. Exhs. 50, 51 (Amended) and 52 (Amended). 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. Olson'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. 52). The combined evidence from Dr. Longo raises an issue of fact as to causation. There remains issues of fact as to whether Mrs. Olson's use of defendant's products for over sixty years exposed her to asbestos and resulted in her mesotheloma.

Defendants' argument that Dr. Longo relies on samples taken before or after Mrs. Olson's alleged exposure and fails to raise an issue of fact, is unpersuasive, given that Dr. Sanchez also relied on at least some studies and samples taken after the relevant period.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority,84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011]).

Defendants arguments that the specific bottles of their products used by Mrs. Olson were not tested and there is no direct evidence of exposure to asbestos, is unpersuasive. Plaintiff is not required to show the precise causes of his damages or quantification, but only show facts and conditions from which defendant's liability may be reasonably inferred. "Summary judgment must be denied when the plaintiff has presented sufficient evidence, not all of which is hearsay, to warrant a trial" (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 further warrants denial of summary judgment sought by the defendants on the strict liability and negligence claims.

Plaintiffs have also 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 plaintiffs argue that the defendants put corporate profits and reputation above the health and safety of the consumer, specifically Mrs. Olson, by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, there is an issue of fact that should be determined by the jury as to whether this conduct was reckless or wanton such that punitive damages are warranted.

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) joint and severable liability, and (9) disclaimer of federal jurisdiction (Mot. Kurland Aff. Exh. A). Defendants are entitled to summary judgment on the fourth, fifth, sixth, eighth and ninth causes of action.

Defendants seeks summary judgment on the causes of action for both fraud and for breach of express warranty, alleging that plaintiffs failed to establish Mrs. Olson's reliance on any fraudulent representations or promises about their products. Defendants argue that there is no implied warranty because plaintiff cannot provide evidence establishing that JBP or Shower to Shower were contaminated with asbestos or otherwise defective. Alternatively, defendants argue that plaintiffs failed to oppose their arguments and they are entitled to summary judgment dismissing the third cause of action for breach of warranty and the seventh cause of action. Defendants provide Mrs. Olson'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. C, pg. 328).

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 Helath and Hospitals Corporation v. St. Barnabus Community Health Plan, 22 A.D. 3d 391, 802 N.Y.S. 2d 363 [1st Dept. 2005]).

Plaintiffs' 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). Plaintiffs did not provide specificity in support of their allegation of fraud. They rely on Ms. Olson's deposition testimony that she stopped using Shower to Shower in 2015 after learning that "there may be a link between talc and ovarian cancer" and failed to make arguments to raise an issue of fact on their 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. Plaintiffs did not claim that Mrs. Olson relied on warranties or statements of fact made by the defendants. Mrs. Olson did not identify any written warranties on the bottles of JJBP or "Shower to Shower" that she used, or state 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.

Defendants have not established a prima facie basis for summary judgment dismissing plaintiffs' claims for implied warranty. Implied warranty applies to fitness for the purpose of the allegedly defective products used by Mrs. Olson and that relate to her negligence claims. Plaintiff has established that issues of fact exist as to whether JJBP and Shower to Shower used by Mrs. Olson were contaminated with asbestos and were defective, or unsuited for their 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 eigth cause of action for joint and severable liability, 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:

Dated: November 9, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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