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 and WILLIAM PROKOCIMER
Plaintiffs,

- against -

AVON PRODUCTS, INC., et al.,

Defendants.

INDEX NO. 190030 /17
MOTION DATE 11-28-2018
MOTION SEQ. NO. 006
MOTION CAL. NO. ____

The following papers, numbered 1 to 5 were read on this motion by defendant R.J. Reynolds and Hollingsworth & Vose for Partial Summary Judgment:

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

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is ordered that Defendants R.J. Reynolds Tobacco Company, as successor by merger to Lorillard Tobacco Company (hereinafter "R.J. Reynolds") and Hollingsworth & Vose Company's (hereinafter "H& V") motion pursuant to CPLR §3212 for partial summary judgment dismissing Plaintiffs' claims for failure to warn, loss of consortium and punitive damages is granted solely to the extent of dismissing the loss of consortium claims. Dismissal of the failure to warn and punitive damages claims is denied.

Plaintiff, Lois Prokocimer, claims that she developed Pleural mesothelioma as a result of smoking Kent cigarettes in the 1950's that were manufactured with an asbestos containing filter. From March 1952 until May 1956 or 1957 Kent cigarettes were manufactured with a filter containing crocidolite asbestos. The asbestos containing filter used in Kent cigarettes was purchased from H&V Specialties, Co., Inc., a former subsidiary of H&V. Plaintiff commenced an action against the defendants, including R.J. Reynolds and H&V to recover for her physical injuries, asserting claims for failure to warn based on negligence (count 1), failure to warn based on strict products liability(count 2), loss of consortium (count 3) and for punitive damages (count 4).

R.J. Reynolds and H&V now move for partial summary judgment dismissing these causes of action in the complaint. They claim that failure to warn counts 1 and 2 should be dismissed because Lorillard and H&V had no duty to warn of dangers that were unknown and unknowable in the 1950's. They claim that the spousal loss of consortium claim, count 3, should be dismissed because counsel has agreed to withdraw Mr. Prokocimer as a party, and has stipulated that they do not intend to pursue any claim on Mr. Prokocimer's behalf. Finally they claim that the punitive damages claim, count 4, should be dismissed because plaintiff cannot prove that either Lorillard or H&V engaged in the requisite conduct under New York Law, and because an award of punitive damages would not advance New York's overriding policy interest of punishment and deterrence.

In support of their motion R.J. Reynolds and H&V provide excerpts of Lois Prokocimer's answers to interrogatories (Exhibit B), e-mail correspondence from plaintiffs' counsel wherein they purport to stipulate to withdraw the claims made by Mr. Prokocimer and remove him from the case (Exhibit F) and the unsworn declaration of Dr. Allen R. Gibbs, a non-licensed foreign doctor and a fellow at the Royal College of pathologists who opines that :

(1) In the 1950's the known risks of asbestos exposure was related to prolonged, intense and heavy direct occupational exposure to asbestos causing asbestosis, and there was no

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

acceptance in the medical community at the time that exposure to asbestos alone, without the presence of asbestosis, would cause lung cancer or mesothelioma; (2) until the Doll report in 1955 bronchogenic carcinoma was not convincingly associated with asbestos exposure; (3) Mesothelioma was not definitely linked to asbestos exposure until 1960 when the Wagner study was published; (4) It was not until Dr. Selikoff's study of insulators in 1964 that end users of asbestos products were known to be at risk for asbestos related diseases; (5) Until the late 1960's, there was a continuing general belief that exposure to asbestos below the TLV of the time period of 5 million particles per cubit foot ("mppcf") of air did not represent a hazard to workers. There was no general recognition within the occupational health community that the use of asbestos at levels below 5 "mppcf" of asbestos containing dust would result in asbestosis or other injury at any time during the 1940's or 1950's. (Exhibit E).

R.J. Reynolds and H&V argue that these exhibits make their prima facie case for entitlement to partial judgment dismissing the first through fourth causes of action in the complaint as a matter of law.

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 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to Plaintiff's injury" (Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995]).

In opposing the motion plaintiff submits 161 exhibits, including plaintiff's deposition transcript, defendants' responses to requests to admit, transcript of deposition and trial testimony of Harold Knudson, Dr. Harris Parmele, Mr. William Thompson an account executive with Young and Rubican in charge of the Kent advertising campaign, Elise Comproni a Massachusetts health inspector, Dr. William Smith, non-party witness Douglas Hallgreen, Thomas Jonathan Revere and Lee Revere, Gerald Kelly, report of examination of Kent cigarette smoke by Wanda K. Farr and Althea Revere, articles on dangers of cigarette smoke and filters from the AMA and JAMA, and reports from Plaintiff's experts Dr. Murray Finkelstein and Dr. Jacqueline Moline.

The exhibits submitted by plaintiff raise an issue of fact as to whether during the period plaintiff smoked Kent cigarettes with an asbestos-containing filter, defendants knew or should have known that asbestos was a harmful carcinogen. Dr. William Smith testified that in 1952 he met with a man from "Kent" and told him about his recent trip to England and that there was evidence linking asbestos with cancer, and that he advised the man from Kent that it would be prudent to use some other material besides asbestos in Kent cigarette filters. Mr. Hallgreen stated that studies done in 1954 on smoke from Kent cigarettes containing an asbestos Micronite filter found asbestos in the smoke and that this information was transmitted to Lorillard along with the report from Fullam's laboratories confirming these findings. Mr. Revere in summarizing information obtained from his mother, Althea Revere, regarding studies she performed on smoke from Kent cigarettes, stated in his deposition that his mother discovered asbestos in the smoke, that she believed if inhaled by a human being it would enter the lungs and some of them become embedded in lung tissue and that it was part of her summary report to Lorillard that continuing use of the Kent Micronite filter posed a severe health risk. Ms. Lee Revere stated that her mother talked about how Kents were advertised as such a great safe filter when they were extremely dangerous. Mr. Gerald kelly testified that Ms. Althea Revere told

him in an interview for the Martha's Vineyard Newspaper, that she had worked for Kent doing studies on smoke, that the smoke contained asbestos and that she had raised a major fuss about it because she knew the dangers of the material.

H & V was informed by Dr. Harris Parmele of asbestos in the smoke from the Kent cigarette. Mr. McHenry testified that Dr. Parmele was concerned with litigation and claims from asbestos in the Micronite filter and that Dr. Parmele was worried about inhaling the fibers and lung cancer; he was concerned about the dangers of inhaling asbestos fibers. By 1954, and after receiving the Fullam laboratories report finding asbestos in the smoke from Kent cigarette, H & V intended to eliminate the use of asbestos in their filter. Mr. Knudson , the technically or scientifcally most educated person at H & V during the 1950's, when asked what did he know about the health hazards of asbestos in the 1952 to 1954 period answered "... not a whole lot but I obviously was aware of the fact that inhalation of any dust of material of that sort was not desirable..."

Despite having this information Lorillard continued to advertise the Kent cigarette with the asbestos Micronite filter as safe, and embarked in an advertising campaign in medical journals, television, newspapers and magazines touting the Kent cigarette with the Micronite filter as offering the greatest health protection.

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. (In re N.Y.C. Asbestos Litig.), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiff raises issues of fact to be resolved at trial. Plaintiff has presented "facts from which R.J. Reynolds and H & V's liability may be reasonable inferred" to warrant denial of their motion for summary judgment. These submissions by plaintiff raise genuine triable issues of fact requiring that the motion to dismiss the failure to warn claim based on negligence (count 1) and strict products liability claim (count 2) be denied.

Plaintiff has also raised an issue of fact requiring denial of summary judgment dismissing the punitive damages claim. The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton, reckless and malicious acts, thereby discouraging the defendant and others from acting in a similar way in the future (In re 91st. Street Crane Collapse Litigation 154 A.D.3d 139, 62 N.Y.S.3d 11 [1st. Dept. 2017]). Plaintiff has presented sufficient evidence from which a jury can conclude that defendants had knowledge, from at least 1952, of the hazards of exposure to asbestos from smoking their asbestos-containing Micronite filter cigarette, that defendants knew that there was asbestos in the smoke from their cigarette and that this asbestos posed a health risk to the end user. A jury presented with these facts could very well find defendants to be wanton and reckless entitling the plaintiff to an award for punitive damages.

However, there has been no argument by plaintiff against defendants' motion to dismiss the loss of consortium claim.

ACCORDINGLY, it is ORDERED that Defendants R.J. Reynolds Tobacco Company, as successor by merger to Lorillard Tobacco Company (hereinafter "R.J. Reynolds") and Hollingsworth & Vose Company's (hereinafter "H& V") motion pursuant to CPLR §3212 for partial summary judgment dismissing Plaintiff's claims for failure to warn, loss of consortium and punitive damages is granted solely to the extent of dismissing the loss of consortium claim, and it is further

ORDERED that the loss of consortium claim on behalf of William Prokocimer asserted as the Third cause of action in the complaint is severed and dismissed, and it is further

ORDERED that the motion to Dismiss the claims asserted in the complaint for failure to warn based on negligence (count 1), for failure to warn based on strict products liability (count 2) and for punitive damages (count 4) is denied, and it is further

ORDERED that the clerk of court is directed to enter partial judgment dismissing the loss of consortium claim.

ENTER:

Dated: December 12, 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