

<b>Spencer v Inamed Corp.</b>
2010 NY Slip Op 30678(U)
March 26, 2010
Supreme Court, New York County
Docket Number: 115384/05
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

*Spencer*

INDEX NO.

115384/05

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

INAMED Corp.

- v -

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion *for summary judgment*

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 1A, 1B

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

*Memo of Law M*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**  
MAR 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/26/10

*[Signature]*  
**MARCY S. FRIEDMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
CATHERINE SPENCER,  
*Plaintiff(s),*

Index No.: 115384/05

- against -

INAMED CORP., et al.,  
*Defendant(s).*

DECISION/ORDER

\_\_\_\_\_ x

In this products liability action, plaintiff Catherine Spencer alleges injuries, including toxic poisoning, arising from breast implants manufactured or distributed by defendants Inamed Corp., Inamed Medical Products Corp., Collagen Aesthetics, Inc., and AEI, Inc. (collectively “Inamed”) and implanted by defendant Dr. George Beraka. The Inamed defendants move for summary judgment dismissing plaintiff’s complaint on the ground that plaintiff cannot establish general or specific causation as to her alleged toxic poisoning.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

In a products liability action involving exposure to an allegedly harmful substance, the plaintiff must prove “general causation” -- i.e., “that the toxin is capable of causing the particular illness,” and “specific causation” -- i.e., that the exposure was sufficient to cause the particular plaintiff’s illness. (Parker v Mobil Oil Corp., 7 NY3d 434, 448.) The plaintiff has the burden of proving the admissibility of the expert evidence on general and specific causation. (See Fraser v 301-52 Townhouse Corp. [Fraser], 57 AD3d 416 [1st Dept 2008], appeal dismissed 12 NY3d 847 [2009], affg 2007 NY Slip Op 32086[U], 2007 WL 2176698 [Sup Ct, New York County 2007] [Kornreich, J.] [trial court reargument decision], modfg 2006 NY Slip Op 51855[U], 2006 WL 2828595 [Sup Ct, New York County 2006] [Kornreich, J.] )

Here, the Inamed defendants make a prima facie showing that plaintiff does not have toxic poisoning caused by the breast implants. Defendants submit the report of plaintiff’s expert, Dr. Ali Guy, who does not make a diagnosis of toxic poisoning. Indeed, Dr. Guy’s report advises plaintiff to have periodic lab work and to “make sure she does not develop any autoimmune disorders.” (See Ds.’ Motion, Ex. S.) Defendants also submit the report of plaintiff’s expert, Dr. Pierre Blais, a chemist, who appears to acknowledge that “the nature of by-products from degradation of the soya oil derivatives in the [breast implant] and their health effects are still under debate in toxicology circles.” (See id., Ex. T.) Dr. Blais is not a medical doctor and did not examine plaintiff. He does not offer, and is not competent to offer, evidence as to the specific causation of plaintiff’s alleged illness. Defendants further cite plaintiff’s deposition testimony in which she stated either that she could not recall whether she had ever been diagnosed with toxic poisoning (see P.’s Dep. at 147, 148), or acknowledged that she had not received such a diagnosis. (Id. at 147, 149.)

Plaintiff submits virtually no opposition to defendants' motion to dismiss plaintiff's toxic poisoning claim. In his five page affirmation in opposition, plaintiff's counsel fails to argue, much less submit evidence to support, plaintiff's contention that she has toxic poisoning. Counsel merely asserts that even if "[d]efendants were correct about Plaintiff's lack of evidence regarding 'toxic poisoning,' they proffered no proof that Plaintiff would be unable to prove the whole host of other damages she has alleged." (See Ogen Aff. in Opp. at ¶ 8.) The court accordingly holds that plaintiff's complaint against the named defendants should be dismissed to the extent the complaint alleges toxic poisoning or toxic substances in her body.

The remaining issue is whether the complaint can stand insofar as it alleges injuries other than toxic poisoning. Defendants seek dismissal of the complaint in its entirety on the ground that plaintiff's claims are based solely on alleged toxic poisoning. In support of this contention, defendants rely upon paragraph 18 of the complaint, which alleges that "[t]he triglyceride filling of the Trilucent Breast Implants lacked biocompatibility and oxidative stability. As a result, its release into the body tissue results in toxic poisoning to the recipients of the Trilucent Breast Implants."

Contrary to defendants' contention, plaintiff's causes of action are not limited to toxic poisoning. For example, plaintiff's cause of action for negligent testing or inspection of the implant does not complain solely of failure to test or inspect for toxic poisoning but, rather, alleges generally that "defendants were negligent, careless, and reckless in failing to properly test, inspect, and design" the implant "such that the product would not pose an unreasonable risk to the health and safety of the recipients." (Compl., ¶ 23.) Plaintiff's strict liability claim does not limit the defect in the product to toxic poisoning, but alleges generally that "the manufacture,


distribution and sale of the [implant] in a defective condition were not reasonably safe to users or consumers.” (Id. at 47.) Plaintiff’s breach of warranty claim alleges generally that defendants made representations “related to the safety” of the implants. (Id. at 55.) Moreover, for each of plaintiff’s claims against the Inamed defendants, the complaint alleges injuries in addition to toxic poisoning, including capsular contracture, scarring, and post traumatic stress disorder. (See Bill of Particulars, ¶6.)

The Inamed defendants do not address the sufficiency of these general allegations to support plaintiff’s causes of action. Indeed, they do not argue even that the alleged claims of misrepresentations are not pled with the requisite specificity. (See CPLR 3016.) Under these circumstances, the court declines to dismiss plaintiff’s complaint insofar as it is based on alleged injuries other than toxic poisoning.

It is accordingly hereby ORDERED that the Inamed defendants’ motion for summary judgment is granted only to the extent that plaintiff’s claims against them are dismissed to the extent that they are based on or allege injuries from toxic poisoning or toxic substances in plaintiff’s body.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 26, 2010

  
\_\_\_\_\_  
MARC V. FRIEDMAN, J.S.C.

**FILED**  
MAR 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE