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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Ling-Cohan PART 36

Index Number : 107968/2009

SWART, LAUREN E.

vs

GENERAL ELECTRIC CO.

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits (memo)	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to dismiss by defendant is decided in accordance with the attached memorandum decision.

FILED

APR 12 2010

NEW YORK
COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 4/8/10

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36
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LAUREN E. SWART, JAMES B. SWART, SR., and DEBORAH B. SWART,

Plaintiffs,

INDEX NO. 107968/09

-against-

GENERAL ELECTRIC COMPANY, GE HEALTHCARE, AS, GE HEALTHCARE INC., and GE HEALTHCARE BIO-SCIENCES CORP.,

Motion Seq. No.: 002

Defendants.

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DORIS LING-COHAN, J.:

Defendants General Electric Company ("GE"), GE Healthcare Inc. and GE Healthcare Bio-Sciences Corp. move for an order pursuant to CPLR 3211(a)7, 3013 and 3016(b) dismissing the complaint.

In this personal injury action, Lauren E. Swart ("plaintiff"), a 19-year-old with a history of kidney disease, and her parents are seeking damages based on allegations that plaintiff developed a form of renal insufficiency known as Nephrogenic Systemic Fibrosis ("NSF"), as a result of exposure to the gadolinium-based contrast agent Omniscan[1], five times between June 26, 2003 and February 2006 during imaging procedures at UNC Health Care facilities in North Carolina.

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[1] Omniscan is a contrast agent used in diagnostic imaging procedures such as magnetic resonance imaging.

The gravamen of the complaint (defendants' exhibit A) is that defendants, who were at all relevant times engaged in the design, manufacture and distribution of Omniscan, knew or should have known that Omniscan posed a significant health risk to patients with renal insufficiency and failed to advise consumers and their healthcare providers of that risk. Five causes of action are asserted: strict product liability; breach of warranty ("express and implied, including safety"); negligence; fraud and misrepresentation; and a derivative claim by plaintiff's parents for her medical expenses. The specific allegations upon which defendants focus their motion are discussed below.

Defendants first argue that plaintiff's claims against GE, the parent of the other defendants, must be dismissed for the following reasons: the complaint fails to allege that GE manufactures, sells or distributes Omniscan; plaintiff's allegations that defendants share revenue, the GE logo, and the GE website are insufficient to pierce the corporate veil; plaintiff's allegation that GE has acknowledged that "GE Healthcare" is a unit of GE which is responsible for Omniscan is insufficient to establish *alter ego* liability absent an allegation of improper dominion by GE; and, plaintiff's conclusory allegation that defendants are corporate successors to Amersham plc, which held the rights to Omniscan, does not impute liability to GE because a corporation which acquires the assets of another is not liable for the torts of its predecessor.

Defendants then argue that plaintiff's claims against all remaining defendants should be dismissed for the following reasons: plaintiff's failure to warn, negligence, and fraud claims, to the extent they are predicated on a duty to warn the general public, are barred by the "informed intermediary" doctrine which provides that manufacturers of prescription drugs have a duty to warn only prescribing physicians, not particular patients or the public at large; plaintiff has failed

to plead specific facts to support a strict products liability/design defect cause of action because she failed to plead facts sufficient to demonstrate that a defect in the product's design rendered the product "not reasonably safe"; plaintiff has failed to allege a strict liability/manufacturing defect cause of action because she failed to allege "that the product was defective when it left the hands of the manufacturer" due to "a mistake in manufacturing;" plaintiff's cause of action for breach of implied warranty fails to state a cognizable claim because she fails to allege that Omniscan was defective at the time it left the manufacturer and that such defect was the proximate cause of her injury; plaintiff fails to state a claim for breach of express warranty because she fails to allege any specific statement of fact or promise that she relied upon or that any warranties were made with respect to Omniscan; and, plaintiff's fraud and misrepresentation claims cannot be sustained because she has failed to plead specific facts supporting the elements of those claims.

The first issue presented by defendants' motion is whether the complaint states a cause of action against GE. The standards applicable to a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) are set forth in *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 (1st Dept 1990):

> A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, Foley v D'Agostino, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (Carbillano v Ross, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (Rovello v Orofino Realty Co., 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations

> are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275).

The complaint alleges in pertinent part the following: Omniscan is stated by GE in its packaging to be a product of GE Healthcare, which is a unit/division of GE (*see* Notice of Motion, Exhibit A, ¶ 5); GE has acknowledged that GE Healthcare is not a separate entity from GE (*id.*, ¶ 6); GE does business as GE Healthcare, including the business of designing, manufacturing, and distributing Omniscan (*id.* ¶ 7); and, GE is engaged in the business of designing, manufacturing, and distributing Omniscan (*id.* ¶ 8). None of these factual allegations, which clearly implicate GE, have been refuted by defendants, who offer no evidentiary support (such as an affidavit from an officer of GE) for their contention that GE is improperly named as a defendant. Furthermore, there has been no discovery. Given the liberal standards applicable to the complaint at this point (see *Khan v Newsweek*, *supra*, 160 AD2d at 426; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff's claims against GE will not be dismissed, except as indicated below.

Plaintiff's first cause of action for strict product liability, alleges that Omniscan was a defective and unreasonably dangerous product when defendants placed it into the stream of commerce and that Omniscan caused plaintiff's injuries (*see* Notice of Motion, Exhibit A, ¶¶ 36-38). "A cause of action in strict products liability lies when a manufacturer places on the market a product which has a defect that causes injury when used carefully and in the manner normally intended" (*Rainbow v Albert Elia Building Co., Inc.*, 79 AD2d 287, 289 [4th Dept 1981], affd 56 NY2d 550 [1982]). The question of whether a product was not reasonably safe is for the jury to decide based on all the evidence presented by both plaintiff and defendants (see *Voss v Black &*

Decker Mfg. Co., 59 NY2d 102, 108 [1983]). Furthermore, plaintiff's failure to warn, negligence, and fraud claims are not barred by the "informed intermediary" doctrine[2] since Omniscan is not a prescription drug and the complaint alleges that defendants failed to warn plaintiff's doctors (*see id.* ¶¶ 30, 32, 50). Thus, at this stage, where no discovery has taken place, the first cause of action will not be dismissed.

Plaintiff's second cause of action for breach of warranty, alleges that "[d]efendants have breached applicable warranties, express and implied, including safety and are therefore liable to [p]laintiffs." (*id.*, ¶ 41). Taking the complaint as a whole (*see Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]), it sufficiently states a cause of action for breach of implied warranty and since this is a personal injury action there is no requirement that plaintiff be in privity with defendants (see *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 410 [1985]). However, the complaint fails to allege that defendants gave express warranties to anyone, including plaintiff and her doctors, concerning Omniscan. Thus, plaintiff's claim of breach of express warranty is dismissed.

Plaintiff's third cause of action for negligence is supported by the allegations in the complaint and will not be dismissed. Plaintiff's complaint alleges that defendants had a duty to insure that the intended user of Omniscan would not be harmed thereby and that their breach of that duty was the proximate cause of plaintiff's injuries (see *Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611, 612 [2d Dept 2008]; *see also Petzold v Roux Laboratories, Inc.*, 256 App

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[2] The "informed intermediary" doctrine provides that warnings for prescription drugs are intended for the physician who acts as an "informed intermediary" between the manufacturer and the patient, and that the manufacturer's duty to warn of a drug's side effects is fulfilled by giving adequate warning through the prescribing physician, rather than directly to the patient (see *Martin v Hacker*, 83 NY2d 1, 9 [1993])

Div 1096 [2d Dept 1939] [actionable negligence results from putting dangerous product on the market]).

Plaintiff's fourth cause of action for fraud claim will also be sustained. In order to state a cause of action for fraud and misrepresentation a plaintiff must allege "(i) a material misrepresentation of fact, (ii) made with knowledge of its falsity, (iii) with the intent to deceive, (iv) justifiable reliance and (v) damages" (*Desideri v D.M.F.R. Group [USA] Co.*, 230 AD2d 503, 505 [1st Dept 1997]). Furthermore, the facts constituting the fraud must be stated in detail (*see* CPLR 3016[b]). Plaintiff's fraud and misrepresentation claim is supported by the following allegations: defendants knowingly and intentionally made false and misleading statements and representations to plaintiff, plaintiff's physicians, the FDA and the public that Omniscan was safe (*see* Notice of Motion, Exhibit A, ¶ 45); defendants concealed or knowingly failed to advise consumers of the risk Omniscan posed to persons with renal insufficiency (*id.*); defendants' representations were false (*id.* ¶ 46); defendants knew based upon animal and human studies, published reports and clinical experience that Omniscan created an unreasonable risk of serious bodily injury (*id.* ¶ 47); defendants had a duty to disclose to plaintiff, plaintiff's physicians, the FDA and the public that Omniscan was not safe for use in patients with renal insufficiency (*id.* ¶ 50); plaintiff and her physicians justifiably relied on defendants' representations that Omniscan was safe (*id.* ¶ 51); and, as a direct and proximate result of defendants' misrepresentations and concealment, plaintiff was administrated Omniscan and suffered serious physical injury (*id.* ¶ 52). Here, the elements of fraud are adequately pleaded (*see Desideri v D.M.F.R. Group [USA] Co., supra*, 230 AD2d at 505; *Standish-Parkin v Lorillard Tobacco Company*, 12 AD3d 301 [1st Dept 2004]). Where concrete facts are within the knowledge of the party charged with

fraud it would work a potentially unnecessary injustice to dismiss a plaintiff's claim at an early stage given that any pleading deficiency might be cured later in the proceedings (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491-492 [2008]). The court reiterates that there has been no discovery and defendants have yet to file an answer. The requirements of CPLR 3016(b) are met when the facts are sufficient to permit a reasonable inference of the alleged conduct (*id.* at 492).

In view of the above, the derivative claim by plaintiff's parents for her medical expenses will also be sustained.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiff's second cause of action for breach of warranty is dismissed to the extent that plaintiff alleges that defendants breached express warranties. In all other respects the motion is denied.

Defendants are directed to serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

It is further

ORDERED that within 20 day of entry of this order, plaintiffs shall serve a copy upon defendants, with notice of entry.

This constitutes the decision and order of the court.

DATED: April 0__, 2010

Hon. Doris Ling-Cohan, J.S.C.

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