SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. DANIEL PALMIERI
Justice Supreme Court

----------X **TRIAL TERM PART 22**

CHARLES CONFORTI, SR., and JANET CONFORTI,

INDEX NO.: 600858/13

Plaintiff,

-against-

Motion Date: 7-19-13
Submit Date: 8-6-13
Seq. No.: 001

COUNTY OF NASSAU, COUNTY OF NASSAU, DEPARTMENT OF PUBLIC WORKS, NEW YORK ISLANDERS HOCKEY CLUB, L.P., SMG, SMG FACILITY MANAGEMENT CORPORATION, ARAMARK CORPORATION, SAVOR, and SMG FOOD AND BEVERAGE LLC,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 5-30-13.....1
Memorandum of Law, dated 5-30-13.....2
Affirmation in Opposition, dated 7-26-13.....3
Reply Affirmation, dated 8-1-13.....4
Reply Memorandum of Law, dated 8-2-13.....5

This motion by the defendants County of Nassau and County of Nassau Department of Public Works (jointly "the County") for an order pursuant to General Municipal Law §§50-e, 50-i and CPLR 3211 (a)(5) and (7) dismissing the complaint against them on the grounds that the plaintiffs have not satisfied the Notice of Claim requirements, that the claims are time barred, and that the complaint fails to state a claim upon which relief can be granted, is determined as provided herein.

The plaintiffs in this action seek to recover for damages they have allegedly sustained on account of the plaintiff Charles Conforti ("plaintiff")'s exposure to asbestos while working at the Nassau Veteran Memorial Coliseum ("Coliseum"), undisputedly owned by the defendant County of Nassau, for approximately 21 years, from 1974 to 1995. The plaintiffs have advanced causes of action sounding in unsafe workplace, violations of Sections 200, 241(6), 902(1) and 902(4) of the Labor Law as well as the Industrial Code and the Occupational Health and Safety Administration's Rules and Regulations ("OSHA")(First cause of action), fraudulent concealment (Second cause of action), premises liability (Third cause of action), intentional infliction of emotional distress (Fourth cause of action), battery (Fifth cause of action), negligent infliction of emotional distress and fear of cancer (Sixth cause of action), negligence/failure to warn (Seventh cause of action), medical monitoring costs (Eighth cause of action) and loss of consortium (Ninth cause of action).

The plaintiff was employed by the defendant SMG as a laborer at the Coliseum from 1974 to 1995. The plaintiffs filed a Notice of Claim with the County on May 2, 2012. They there alleged that the plaintiff was continuously exposed to asbestos at the Coliseum for the 21 years of his employment. They further allege that the plaintiff began suffering from COPD (Chronic Obstructive Pulmonary Disease), emphysema, asbestosis and prostate cancer in 2009, but that they did not discover that the asbestos contamination at the Coliseum was the cause of the plaintiff's injuries until March, 2012. They also maintain that the plaintiff is presently suffering from "extreme and severe distress due to fear of cancer." This action, containing the causes of action set forth above, was

commenced on April 5, 2013.

The plaintiffs appeared for hearings pursuant to section 50-h of the General Municipal Law on September 13, 2012. Certain important testimony was elicited at these examinations. The plaintiff stated that he left his employment at the Coliseum in 1995 or 1996 (p. 21), which was confirmed by Mrs. Conforti (p. 8). The plaintiff testified that during his employment at the Coliseum, he was a laborer and that his work assignments sometimes included demolition (p. 56, 59, 61, 64). As to his ailments, Mrs. Conforti stated that the plaintiff developed problems with his prostate in the mid-2000's (p. 33-34). She also testified that the plaintiff was diagnosed with COPD and emphysema in 2009 (p. 31), and the plaintiff himself testified that he was diagnosed with emphysema "a while ago" (p.30). Mrs. Conforti also testified that a nodule was found in the plaintiff's lung in 2009 by a pulmonologist, but they were advised that while his lungs were "not good," there was no cancer (p. 16).

They went to several different doctors in 2009, but "nobody really diagnosed him" (Mrs. Conforti, p. 19). Both the plaintiff and Mrs. Conforti testified that it was not until 2009 that the plaintiff began experiencing breathing problems, as a result of which he was put on oxygen 24 hours a day (plaintiff p. 21, Mrs. Conforti, p. 14). Both Mrs. Conforti and the plaintiff also testified that the nodule was detected in the plaintiff's right lung in August of 2011 (plaintiff p. 27-28, Mrs. Conforti p. 17-18, 21). However, plaintiff was not diagnosed with any related illness at that time; the physician "let it go" because of its small size (plaintiff p. 29). The plaintiff testified that he was diagnosed with prostate cancer in January 2012 and lung cancer in March 2012 (p. 26). Mrs. Conforti testified

that lung biopsies had to be performed at Stony Brook University twice before the plaintiff's lung cancer was diagnosed; the first time in January or February 2012 and again a "couple of weeks" later because the plaintiff's lung collapsed during the first attempt at a biopsy (Mrs. Conforti p. 22 - 24). The plaintiff's medical records indicate that he was officially diagnosed with "malignant neoplasma of upper lobe, bronchus or lung," *i.e.*, cancer, on April 11, 2012.

The plaintiff also testified at his 50-h hearing that although he was aware of the presence of asbestos at the Coliseum during his employment, he first learned about "trouble" related to the asbestos from his son, who was working there in March 2012 (plaintiff p. 39). Both the plaintiff and Mrs. Conforti, as indicated above, testified that none of the several physicians who treated the plaintiff discussed a possible link between the plaintiff's illnesses and his work history before that time (plaintiff p. 68, Mrs. Conforti p. 36, 38-39). There is no evidence as to when a diagnosis of asbestosis was made. The plaintiff was declared disabled by the New York State Worker's Compensation Board as of April 16, 2013. The Board found that the plaintiff "has an occupational disease cancer, emphysema and COPD."

Notice of Claim/ Statute of Limitations

Initially, the Court notes that it has considered the testimony from the General Municipal Law § 50-h hearings, which can be reviewed on a motion to dismiss a complaint (*see Kraut v City of New York,* 85 AD3d 979 [2d Dept. 2011]) or to attack a notice of claim as insufficient. *Parker- Cherry v New York City Hous. Auth.,* 62 AD3d 845 (2d Dept. 2009). It may also contain judicial admissions which, while not conclusive, are evidence of relevant knowledge. *See Matter of Union Indem. Ins. Co. of*

N.Y., 89 NY2d 94, 103 (1996); *Ocampo v Pagan,* 68 AD3d 1077, 1078 (2d Dept.2009).

As to the merits of this branch of the County's motion, General Municipal Law §50-e(1)(a) requires that a Notice of Claim be filed within 90 days of a claim's accrual as a prerequisite to suing a municipality. Compliance with that statute is a condition precedent to bringing suit. General Municipal Law §50-i; *Khela v. City of New York*, 91 AD3d 912 (2d Dept. 2012). In order to determine whether the plaintiffs have complied with the General Municipal Law, it first must be determined when their claims accrued, and the Court therefore looks to the relevant statutes and decisional authority to reach its conclusions.

The limitations period for a personal injury claim predicated on negligence is three years. CPLR 214(4). For claims against the County, the limitations period is one year and 90 days. General Municipal Law §50-i(1). However, CPLR 214-c applies to personal injury claims such those advanced here. It requires a party to commence an action to recover for personal injuries allegedly caused by the latent effects of his or her exposure to a substance or combination of substances, in any form, within three years of the date when the injury was discovered, or through the exercise of reasonable diligence should have been discovered. *Matter of New York County DES Litig.*, 89 NY2d 506, 513-514 (1997); *Scheidel v. A.C. and S. Inc.*, 258 AD2d 751 (3d Dept. 1999), *lv den.*, 93 NY2d 809 (1999). CPLR 214-c applies only to personal injury claims and injury to property claims, and not to intentional torts or causes of action based on any other theory (*see, Matter of Plaza v. Estate of Wisser*, 211 AD2d 111, 118 [1st Dept. 1995]), and claims made pursuant to General Municipal Law §§ 50-e and 50-i are similarly limited as

well. *See* CPLR 214-c(3).

Even if the CPLR 214-c(2) and (3) periods would otherwise have expired, a plaintiff can take advantage of up to a maximum of six years to act pursuant to CPLR 214-c(4), if discovery of the cause of the injury occurred within five years after discovery of the injury itself (or when the injury could have been found with due diligence), provided the plaintiff commenced suit or made the claim within a year following discovery of the cause and can make the showings described in the statute. CPLR 214-c(4); *see Giordano v Market Am., Inc.,* 15 NY3d 590 (2010). In order to invoke the tolls provided for in CPLR 214-c(4), a plaintiff is "required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized... ." CPLR 214-c(4). The Court of Appeals has held that: "a causal relationship will be sufficiently ascertained for CPLR 214-c(4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts." *Giordano v. Market Am., Inc., supra,* at p. 601-602.

In addition, another factor to be weighed is whether one particular injury may form the basis of a timely action, even if another may not. This is the so-called "second injury" or " two injury" rule. *Fusaro v. Porter-Hayden Co.*, 145 Misc.2d 911 (Sup. Ct. NY County), *affd for reasons stated*, 170 AD2d 239 (1st Dept. 1991); *Shapiro v. Ansell Perry, Inc.*, 291 AD2d 301 (1st Dept. 2002). "[T]he three year limitations period for bringing an action to recover for the latent effects of exposure to a toxic substance

'commences when the injured party discovers the primary condition on which the claim is based.' " *Whitney v. Quaker Chem. Corp.*, 90 NY2d 845, 847 (1997) *quoting Matter of New York County DES Litigation, supra*, at p. 509. However, "where the statute of limitations has run on one exposure-related medical problem, a later medical problem that is separate and distinct is still actionable (quotations and citation omitted)." *Humphreys v. Humphreys*, 949 F. Supp. 1014 (EDNY 1997). " [U]nder the two-injury rule, diseases that share a common cause may nonetheless be held separate and distinct where their biological manifestations are different and where the presence of one is not necessarily a predicate for the other's development (quotations and citations omitted)." *Golod v. La Roche*, 964 F.Supp. 841 (SDNY 1997).

Accordingly, and for example, the fact that an asbestosis claim is time barred does not preclude an otherwise timely cancer claim. *Fusaro v. Porter-Hayden Company*, *supra*, at p. 915; *Shapiro v Ansell Perry, supra.* The County maintains that all of the plaintiff's claims accrued in 2009 when he was diagnosed with COPD, and emphysema, or at the latest in September 2011 when he was diagnosed with a "mass in the right upper lobe lung." The County relies on *Matter of New York County DES Litigation*, (*supra* at p. 513) and *Scheidel v. A.C. and S., Inc.*, (*supra* at p. 753). Those cases stand for the proposition that "[t]he Statute of Limitations for a toxic tort begins to run from the ... ' discovery of the physical condition and not ... the more complex concept of discovery of both the condition and the nonorganic etiology of that condition (citation omitted).'" *Scheidel v. A.C. & S., Inc., supra*, at p. 752, *quoting Matter of New York County DES Litigation, supra*, at p. 514. However, this does not address the two-injury rule.

Under the foregoing authority, the evidence is conclusive on the running of the statute of limitations with respect to the COPD and emphysema because there simply is no factual issue about when the diagnosis was made as to each and thus when the plaintiff and her husband attained knowledge of these injuries. That is sufficient to find that the CPLR 214-c periods began to run in 2009, rendering claims against the municipality based on these injuries untimely. Nevertheless, the 50-h testimony also indicates the possibility that the plaintiff discovered the lung cancer alleged in the Notice of Claim against the County in March 2012, rendering the Notice timely as to this ailment. There is no evidence that this cancer is an "outgrowth, maturation or complication" of the other illnesses, which would connect these other illnesses and thus bar this claim. *Fusaro v. Porter-Hayden Co, supra*, at 916. This is also true with respect to the asbestosis claim. *Id.*

To the extent defendant argues that in view of Mr. Conforti's breathing problems, he should have discovered the asbestosis and lung cancer injuries "through the exercise of reasonable diligence," the Court finds that this has not been demonstrated as a matter of law. The plaintiff did not ignore symptoms, and went to a number of doctors. Because emphysema and asbestosis both can affect breathing, and none of the many physicians who examined him mentioned the possibility of the latter, it cannot be said conclusively that the plaintiff should have discovered or inquired about this asbestos-related injury at the time the emphysema was diagnosed.

This finding is bolstered by plaintiff's testimony that he did not become aware of any "trouble" with the asbestos in the building until his son told him, and his additional

testimony that he had smoked two packs of cigarettes per day for many years -- which certainly could have explained breathing problems to the plaintiff and to a doctor who knew nothing of the exposure to friable asbestos. The same is true of the lung cancer claim, as the earlier findings of a spot/nodule on the lung may not have been identified as cancer by any physician, and also could be related to smoking. The Court therefore cannot find that these two injuries "should have been discovered in the exercise of reasonable diligence" (CPLR 214-c[3]) at the earlier dates suggested by the defendant. Therefore, the County has not established as a matter of law that the plaintiffs' Notice of Claim was untimely with respect to the plaintiff's asbestosis and lung cancer claims.

However, as noted above, the plaintiff's claims grounded on his COPD and emphysema diagnoses accrued no later than when they were diagnosed in 2009. The prostate cancer was diagnosed in January of 2012. Plaintiffs were thus aware of these injuries on these dates. The Notice of Claim, which was filed on May 2, 2012, thus was not filed within 90 days of those claims' accrual. While the plaintiffs allege that they did not learn of the causative link between the asbestos at the Coliseum and the plaintiff's injuries until March, 2012, their lack of personal knowledge, standing alone, does not entitle them to the extension permitted by CPLR 214-c(4). There are no allegations made that would satisfy the additional showings needed under the statute to attain such extension, which is plaintiffs' burden. *Singh v. New York City Health & Hosps. Corp.*, 107 AD3d 7800 (2d Dept. 2013); *Giordano v. Market Am. Inc., supra* at p. 601-602.

The plaintiff's COPD, emphysema and prostate cancer claims therefore are dismissed for an untimely filing of a Notice of Claim pursuant to General Municipal Law

§50-e. This branch of the County's motion is otherwise denied.

A defendant seeking dismissal of a complaint as barred by the Statute of Limitations bears the initial burden of proof. *Singh, supra.* To meet that burden, the defendant must demonstrate that the time in which the claims advanced by the plaintiff must be brought has expired, but need not demonstrate that exceptions such as tolls or extensions do not apply; the burden of establishing the applicability of a toll or other extension lies with the plaintiff. *Assad v City of New York,* 238 AD2d 456 (2d Dept. 1997).

This action was commenced on April 5, 2013. Given the accrual date, as discussed above, plaintiffs' claims grounded on COPD or emphysema are untimely, and are thus dismissed pursuant to CPLR 3211(a)(5). However, the County has not established that this action was not commenced within one year and 90 days of the accrual of the plaintiff's claims predicated on asbestosis and lung cancer.

As to the prostate cancer, the precise date in January, 2012 when plaintiffs learned of this diagnosis will determine timeliness, [1] as the commencement date of April 5, 2013 means that a matter of a few days can be determinative. Disclosure would be needed to establish that date. CPLR 3211(d). This branch of the motion is thus denied as to claims founded on this illness, and asbestosis and lung cancer, with regard to the negligence-based claims – the First, Third, and Seventh causes of action.

The limitations period for fraud is six years from its commission, or two years

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[1] The Court recognizes that the failure to serve and file the Notice of Claim timely with respect to the prostate cancer renders this academic, but is discussed here to provide a full record.

from when the alleged fraud was discovered or could have been discovered with reasonable diligence, whichever is longer. CPLR 213(8), 203(g); *Siler v. Lutheran Social Servs. of Metro. N.Y.*, 10 AD3d 646, 648 (2d Dept. 2004). Thus, a claim alleging fraud "accrues at the time the plaintiff possesses knowledge of facts from which fraud could have been discovered with reasonable diligence (citations omitted)." *Town of Poughkeepsie v. Espie*, 41 AD3d at 701, 705 (2d Dept. 2002), *lv dismissed*, 9 NY3d 1003 (2007), *lv denied*, 15 NY3d 715 (2010). However, the limitations period with respect to the County defendants regarding this tort is one year and 90 days "after the happening of the event upon which the claim is based." *Sandpebble Bldrs., Inc. v. Mansir*, 90 AD3d 888 (2d Dept. 2011). Further, the fraud claim does not benefit from the extension provided by CPLR 214-c. *Weisman v. Dow Corning Corp.*, 892 F. Supp 510 (SDNY 1995); *Plaza v. Estate of Wisser, supra* at p. 118.

A fraudulent concealment claim adds a new element, as by its nature concealment is a continuing "event." Thus, "a fraudulent concealment continues until (1) the victim of the fraud discovers the true facts; (2) the victim ceases to rely upon the fraudulent failure to reveal; or (3) the party engaged in the fraud no longer has a duty to disclose the concealed facts. The moment that any of these events occur, the fraud has terminated and the accrual portion of the Statute of Limitations begins to run." *Harkin v Culleton*, 144 Misc.2d 656 (Supreme Court New York County 1989), *affd in part, mod in part*, 156 AD2d 19 (1st Dept. 1996), *appeal dismissed*, 76 NY2d 936 (1990); *see also Konstantikis v. Kassapidis*, 196 AD2d 858 (2d Dept. 1993).

Even assuming that the defendant concealed the presence of friable, dangerous asbestos, and that plaintiffs did not discover that the Coliseum's asbestos condition was the cause of the plaintiff's illnesses until March, 2012, the plaintiff stopped relying on the County's concealment when he stopped working at the Coliseum in 1995. The fraudulent concealment claim was not interposed until 2013 and thus is untimely, and the Second cause of action is therefore dismissed in its entirety pursuant to CPLR 3211 (a)(5).

The statute of limitations period for intentional torts, which would include the present claim of intentional infliction of emotional distress claim, is one year and ninety days when asserted against a municipality. *Bosone v County of Suffolk,* 272 AD2d 532 (2d Dept. 2000). The plaintiffs allege that the County allowed the plaintiff to continue to work at the Coliseum despite their knowledge of the presence of asbestos, as well as its danger. "A cause of action for intentional infliction of emotional distress accrues on the date of injury (citations omitted)." *Wilson v. Erra*, 94 AD3d 756, 756 (2d Dept. 2012). As indicated, any CPLR 214-c extension does not apply to intentional torts. *Plaza v. Estate of Wisser, supra*, at p. 118.

The Court finds that the plaintiff's claim for intentional infliction of emotional distress with respect to his prostate and lung cancer accrued in January and March of 2012, when plaintiff learned of them, which caused the injury (distress). As noted, the precise date of the prostate cancer diagnosis will determine timeliness, but has not been established here. Further, there is no proof submitted by defendant as to when the diagnosis of asbestosis was made, and as discussed above discovery of this illness cannot

be tied to the discovery of emphysema as a matter of law. However, the County has established that the plaintiff's intentional infliction of emotional distress claim is untimely with respect to the plaintiff's COPD and emphysema diagnoses in accord with the discussion set forth above. The Fourth cause of action therefore is dismissed as untimely pursuant to CPLR 3211 (a)(5) to the extent it is based on these latter two ailments, but is denied as to the asbestosis, prostate and lung cancers.

The Statute of Limitations for a battery claim against a municipality is also one year and ninety days. *Bosone v County of Suffolk, supra.* A claim for battery accrues when the nonconsensual physical contact occurs. *Plaza v. Estate of Wisser*, *supra*, at p. 118. Again, CPLR 214-c does not apply to intentional torts. *Plaza v. Estate of Wisser, supra*, at p. 117. The plaintiff stopped working at the Coliseum in 1995 and his last exposure to asbestos was no later than that year. The battery claim (Fifth cause of action) is untimely and is therefore dismissed in its entirety pursuant to CPLR 3211 (a) (5).

The Statute of Limitations for negligent infliction of emotional distress is three years. CPLR 214(3); *Yong Wen Mo v. Gee Ming Chan*, *supra,* at p.358. However, with respect to the County, it is one year and 90 days. A cause of action for negligent infliction of emotional distress does not accrue until "all of the elements including damages, could be truthfully alleged in his complaint." *Yong Wen Mo v. Gee Ming Chan, supra*, at p. 358-359, *citing Augeri v. Roman Catholic Diocese of Brooklyn,* 225 AD2d 1105, 1106 (4th Dept. 1996). For the reasons set forth above concerning the other negligence-based causes of action, the plaintiff's claim for the negligent infliction of emotional distress is untimely with respect to the plaintiff's COPD and emphysema

diagnoses. The Sixth cause of action therefore is dismissed as untimely pursuant to CPLR 3211 (a)(5), to the extent it is based on these claims, but is denied with respect to distress caused by asbestosis, prostate and lung cancers.

Similarly, the plaintiff's medical monitoring claim (Eighth cause of action) has been demonstrated to be untimely with respect to his COPD and emphysema claims. Thus, this claim also is dismissed as untimely pursuant to CPLR 3211 (a)(5), to that extent.

As a derivative claim, the loss of consortium cause of action asserted by Mrs. Conforti must also be dismissed if the plaintiffs' claims fall. *See, e.g., Clarke v City of New York,* 82 AD3d 1143 (2d Dept. 2011); *Rothfarb v. Brookdale Hosp.*, 139 AD2d 720 (2d Dept. 1988). Accordingly, the Ninth cause of action is dismissed to the extent the plaintiff's claims are untimely, as indicated.

Failure to State a Cause of Action

The Court now turns to the other basis for dismissal asserted by the County, that each of the causes of action fails to state a cause of a action under New York law. It does so in the face of its holdings above that certain claims discussed below must be dismissed in any event pursuant to the General Municipal Law and/or the Statute of Limitations, in order to provide trial court rulings should some or all of the Court's holdings regarding other bases for dismissal be reversed or modified on appeal.

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211 (a)(7), the pleading is to be afforded a liberal construction (CPLR 3026), and the Court is bound to accept as true the facts alleged, accord plaintiff the benefit of every

possible inference, and determine only whether these facts fit within any cognizable legal theory. *Hurrell-Harring v State,* 15 NY3d 8, 20 (2010); *see also Leon v. Martinez*, 84 NY2d 83, 87 (1994); *Holster v. Cohen*, 80 AD3d 565, 566 (2d Dept. 2011).

Where evidence is submitted , "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (citations omitted)." *Leon v Martinez*, *supra,* at p. 88; *Holster v Cohen, supra.* A plaintiff thus is permitted to remedy pleading defects to avoid dismissal under CPLR 3211 (a)(7). *Nonnon v. City of New York*, 9 NY3d 825, 827 (2007); *Leon v. Martinez, supra* at p. 88; *Rovello v. Orofino Realty Co. Inc.*, 40 NY2d 633, 635-636 (1976). "[U]nless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (citations omitted)." *White Plains Plaza Realty, LLC v. Cappelli Enterprises*, Inc., 108 AD3d 634 (2d Dept. 2013); *see also Pechko v. Gendelman*, 20 AD3d 404, 406-407 (2d Dept. 2005).

To the extent that the CPLR 3211(a)(7) motion relies on documentary evidence, it calls up CPLR 3211(a)(1) and its related case law. "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 AD3d 78, 83 (2d Dept. 2010). "In order to evidence to qualify as documentary, it must be unambiguous, authenticated and undeniable (citations omitted)." *Granada Condominium III Assn v. Palomino*, 78 AD3d 996, 997 (2d Dept. 2010). "[J]udicial records, as well as documents reflecting out-of-court transactions such as

mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case." *Fontanetta v. John Doe 1, supra*, *Cives Corp., v. George A. Fuller Co., Inc.*, 99 AD3d 713, 714 (2d Dept. 2012). "At the same time, neither affidavits, deposition testimony nor letters are considered documentary evidence within the intendment of CPLR 3211 (a)(1) (quotations and citations omitted)." *Cives Corp., v. George A. Fuller Co., Inc., supra* at p. 714.

As with the branches of the County's motion decided above, the Court has considered the 50-h hearing transcripts in reviewing the vitality of the plaintiffs' claims.

Under the common law, liability for a dangerous condition on property is predicated on ownership, occupancy, control or special use. *DeCourcey v. Briarcliff Cong. Church*, 104 AD3d 799 (2d Dept. 2013). Property owners can be liable to any person injured on the premises under the common law if a dangerous condition existed, and the owner had either actual or constructive notice of the danger. If the injured plaintiff was a worker, this remains true irrespective of whether the owner supervised plaintiff's work. *Payne v 100 Motor Parkway Assoc., LLC.*, 45 AD3d 550, 553 (2d Dept. 2007).

As an individual employed at the County's premises, Conforti also was of the class of persons protected by Labor Law § 200, which provides that all such employees be provided with a safe place to work. Insofar as this statute affects property owners, it is simply a codification of the common law. *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 50-51 (2d Dept. 2011). Thus, for liability to be imposed on the property owner for a

workplace injury under either the common law or Labor Law § 200, there must be evidence that the owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time. *Id.*

The complaint alleges, *inter alia,* that the County knew or should have known about the presence of asbestos and its danger, that the plaintiff was exposed to the danger, and that he was injured as a result. Plaintiff also alleges that the County violated Labor Law §§ 200, 241(6), 902(1) and 902(4), as well as the New York Industrial Code, 12 NYCRR §§ 12, 23 and 56, and various sections of the Code of Federal Regulations containing rules and regulations promulgated under the Occupational Safety and Health Act ("OSHA") regarding, among other things, the handling of airborne contaminants such as asbestos.

Initially, the Court agrees with the County that the amended complaint fails to state a claim to the extent it is premised on Labor Law § 902, the Industrial Code sections cited and the OSHA regulations. Further, even assuming that a private right of action exists thereunder, by its terms § 902 applies to licensing and certification of contractors engaged in asbestos projects, not to individuals who are simply working in the presence of asbestos.

While their violation ultimately may be of use to plaintiffs in proving that the defendants were negligent or violated the Labor Law, the Court has found no indication that a private right of action exists under the Industrial Code sections they cite separate and apart from the statute and common law. Violations of such sections are viewed as

evidence of negligence, but are not stated to be a basis for a separate cause of action. *See generally Bauer v Female Academy of Sacred Heart,* 97 NY2d 445, 453 (2002); *Cruz v Long Is. R.R. Co.,* 22 AD3d 451 (2d Dept. 2005), *lv denied*, 6 NY3d 703 (2006). . Nor do OSHA regulations provide workers with a private right of action. *Donovan v Occupational Safety and Health Review Com'n,* 713 F2d 918 (2d Cir. 1983). Accordingly, the Court finds that a cause of action cannot be based directly on these State and Federal regulations. This has been conceded by the plaintiff in his affirmation and memorandum in opposition.

However, the Court finds that the complaint adequately states claims sounding in negligence against the County pursuant to the common law and Labor Law § 200. The allegations, while pled against other defendants as well, assert that Conforti was exposed to asbestos while working in the Coliseum, names the County and refers to, among other things, asbestos being maintained, installed, used, purchased, or disturbed by the County, and/or permitted to exist by using or permitting to be used asbestos-containing products, with no warning to plaintiff and no correction/abatement of the dangerous condition. As the owner of the premises, the County has not conclusively demonstrated that it had no control over all areas where persons in the plaintiff's position might have worked and, according to the plaintiff, where he was exposed to the asbestos. Nor has it conclusively demonstrated that the County had nothing to do with creating/installing the material, and/or was unaware of it at the time Conforti was working in the building, and thus did not know about the condition that had to be remedied for the protection of workers in his

position.

Further, and unlike the circumstances surrounding Conforti's discovery of his illnesses, discussed above, the absence of specifics as to the placement of the asbestos, the County's knowledge thereof, and the acts or omissions of the County with regard to this material that may have occurred, should not lead to dismissal. These are not particularized claims plaintiffs can be expected to articulate without discovery. The Court finds reason to deny the motion as to plaintiff's remaining causes of action on that basis as well. CPLR 3211(d); *see Halmar Corp. & Defoe Corp. v Hudson Founds. Inc.*, 212 AD2d 505 (2d Dept. 1995).

Similarly, discovery should be permitted in lieu of dismissal of the Labor Law § 241(6) claim. Labor Law §241(6) "is meant to protect workers (engaged in) duties connected to the inherently hazardous work of construction, excavation or demolition...." *Nagel v. D & R Realty Corp.*, 99 NY2d 98, 101 (2002). Liability will not be imposed under Labor Law §241(6) "unless the plaintiff's injury resulted from an accident in which construction, demolition or excavation work was being performed (citation omitted). " *Walton v. Devi Corp.*, 215 AD2d 60, 62 (3d Dept. 1995), *lv denied*, 87 NY 2d 809 (1996). Further, "[t]o establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (citation omitted)." *Buckley v. Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007), *lv denied*, 10 NY3d 710 (2008). "The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (citation

omitted)." *Id.*,, at p. 271. The violation of the regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury. *Id.*

The facts alleged in the complaint do not specifically claim that Conforti performed construction, demolition, or excavation work. Nevertheless, the General Municipal Law § 50-h testimony supplements the complaint as it indicates that he performed the kind of work covered by Labor Law §241(6), namely demolition work. *Rovello v. Orofino, supra*. Further, and contrary to the County's argument, the Court finds that the plaintiffs have adequately pled the County's notice element in support of his First, Third and Seventh causes of action. Accordingly, that branch of the motion that is to dismiss these claims pursuant to CPLR 3211(a)(7) is denied.

"To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (citation omitted)." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN Amro Bank, N.V.*, 301 AD2d 373, 376 (1st Dept. 2003). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so (citations omitted)." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN Amro Bank, N.V., supra* at p. 376; *see also, Schwatka v. Super Millwork, Inc.*, 106 AD3d 897 (2d Dept. 2013). CPLR 3016 (b) requires that a fraud claim be pled

with specificity. Nevertheless,

> "neither CPLR 3016 (b) nor any other rule of law requires a plaintiff to allege details of the asserted fraud that it may not know or that may be peculiarly within the defendant's knowledge at the pleading stage. CPLR 3016 (b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of.." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN Amro Bank, N.V.*, *supra* at p. 377.

CPLR 3016 (b) "must not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud (quotations and citations omitted)." *Caprer v. Nussbaum*, 36 AD3d 176, 202 (2d Dept. 2006); *P.T. Bank Cent. Asia, N.Y. Branch v. ABN Amro Bank, N.V.*, *supra.*

The plaintiffs have pled that the defendants told the plaintiff that "there was no asbestos at the Nassau Coliseum" and that "no one had ever become sick, injured and/or died from asbestos" even though other individuals had in fact become sick. They further allege that this was done to prevent disruption of business at the Coliseum and to insure that plaintiff continued to work there. Given these allegations, discovery in lieu of dismissal for lack of specificity is justified. CPLR 3211(d); *Caprer v. Nussbaum, supra*, at p. 203; *Grumman Aerospace Corp. v. Rice*, 196 AD2d 572 (2d Dept. 1993).

The Court disagrees with the County that this claim should be dismissed under the authority of *Ruffing v. Union Carbide Corp.*, 308 AD2d 526, 528 (2d Dept. 2003), based on its contention that because the damages flowing from the fraudulent conduct are not alleged to be distinct from those alleged under the negligence claims, fraud cannot be pled. The Appellate Division's analysis regarding damages was cited to demonstrate why the statute of limitations had run in that case, and the statements from that court regarding the absence of separate

damages were made in that context. Other cases in which the absence of fraud damages distinct from negligence damages were noted arose in the context of professional malpractice. The courts there disallowed duplication of claims where the allegations of fraud essentially were part and parcel of the malpractice, and/or the fraud was simply a concealment of the malpractice itself, and thus caused no separate damages. *See White of Lake George v Bell,* 251 AD2d 777 (3d Dept. 1998); *see also Giannetto v Knee*, 82 AD3d 1043 (2d Dept. 2011); *Carl v Cohen,* 55 AD3d 478 (1st Dept. 2008).

Here, however, there are separate allegations of fraudulent concealment that go beyond mere concealment of the defendant's alleged negligence, and there is no logical or pleading impediment to such separate theories. CPLR 3014; *see Miele v American Tobacco Co.,* 2 AD3d 799 (2d Dept. 2003) [both fraudulent concealment and negligence claims permitted in damages action brought by personal representative of deceased cigarette smoker]. Accordingly, so much of the defendant's motion that is to dismiss the Second cause of action for failure to state a cause of action is denied.

The intentional infliction of emotion distress claim is based on allegations that the defendant knowingly allowed plaintiff to work where toxic levels of friable asbestos were present, while being aware of the risks. The Court does not pass on the merits of these allegations claim because such claims are barred against governmental entities as a matter of public policy. *Afifi v. City of New York*, 104 AD3d 712 (2d Dept. 2013); *Eckardt v City of White Plains*, 87 AD3d 1049 (2d Dept. 2011). Accordingly, the Fourth cause of action is dismissed pursuant to CPLR 3211(a)(7).

To sustain an action for battery, the plaintiff must allege that there was bodily contact, the contact was offensive, and that the defendant intended to make the contact

without the plaintiff's consent. *Bastein v Sotto,* 299 AD2d 432 (2d Dept. 2002), "The intent required for battery is 'intent to cause a bodily contact that a reasonable person would find offensive.'" *Cerilli v. Kezis,* 16 AD3d 363, 364 (2d Dept. 2005*), quoting Jeffreys v. Griffin*, 1 NY3d 34, 41, n. 2, (2003). "An action for battery may be sustained without a showing that the actor intended to cause injury as a result of the intended contact, but it is necessary to show that the intended contact was itself 'offensive,' i.e., wrongful under all the circumstances." *Zgraggen v. Wilsey*, 200 AD2d 818, 819 (3d Dept. 1994). The County's intent to make offensive contact has been adequately pled, and defendant's motion to dismiss the Fifth cause of action pursuant to CPLR 3211(a)(7) is therefore denied.

The negligent infliction of emotional distress and fear of cancer cause of action has been adequately pled. This claim generally arises in the medical malpractice area, and does not rely on any physical injury, but rather is based upon heightened anxiety because disease was not timely discovered and treated. *Trapp v Metz,* 28 NY2d 913 (1971), *revg. on dissenting mem. below* 35 AD2d 851 (2d Dept. 1970). Although it appears that under current law a plaintiff can sue for the threat of future harm only if symptoms have become manifest (*Pannicia Long Is. R.R. Co.,* 297 AD2d 366 [2d Dept. 2002]), and not for harm that has not been realized at all (*Bossio v Fiorillo,* 219 AD2d 836 [3d Dept. 1994]), lung and prostate cancer have been diagnosed. Thus, the allegation of exposure to the toxic substance, combined with a rational basis for plaintiff's fear for future harm as established by these diagnoses, support the claim. *See Abusio v*

Consolidated Edison Co. of N.Y., 238 AD2d 454 (2d Dept. 1997). As no dispositive proof that would serve to negative the allegations set forth in the complaint has been presented, that branch of the the motion that is to dismiss the Sixth cause of action pursuant to CPLR 3211(a)(7) is denied.

However, given such actual diagnoses the Court agrees with the moving defendant that no separate cause of action is stated with regard to the plaintiff's medical monitoring claim. Any such costs, if paid by the plaintiff, would simply constitute an element of economic damages and do not constitute a separate cause of action, as might exist if he had not yet been diagnosed. *Compare, Caronia v. Philip Morris, USA, Inc.*, 715 F.3d 417 (2d Cir. 2013), *certified question accepted*, 21 NY3d 937 (2013); *Geardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657 (Supreme Court Westchester County 1991) *revd on other grounds*, 521 US 424 (1997) [medical monitoring claims may be permitted based on a valid fear of disease which has not yet been diagnosed]. The medical monitoring claim (Eighth cause of action) is therefore dismissed pursuant to CPLR 3211 (a) (7).

The plaintiffs have alleged that "Janet Conforti has suffered a loss of consortium including but not limited to companionship, affection, support, services and society of said plaintiff Charles Conforti, Sr." (Ninth cause of action.) This is sufficient where the plaintiff Charles Conforti's claims have been sustained., but as a derivative claim, the loss of consortium cause of action asserted by Mrs. Conforti must also be dismissed where the plaintiff's claims have fallen. *Clarke v City of New York, supra*; *Rothfarb v. Brookdale Hosp. supra.* Accordingly, the Ninth cause of action is dismissed pursuant to CPLR 3211(a)(7) to the extent the Court has dismissed the plaintiff's causes of action, and is otherwise denied.

In sum, the County's motion is granted as follows: All claims are dismissed pursuant to General Municipal Law § 50-e(1)(a) [Notice of Claim] to the extent they are based on COPD , emphysema and prostate cancer, and CPLR 3211(a)(5) [statute of limitations] to the extent they are based on COPD and emphysema. Further, the Second cause of action (fraudulent concealment) and Fifth cause of action (battery) are dismissed in their entirety pursuant to CPLR 3211(a)(5).

Further, so much of the First cause of action that may be interpreted as seeking separate compensation for violations of Labor Law § 902, the Industrial Code sections and the OSHA regulations cited in the complaint is dismissed. The Fourth cause of action (intentional infliction of emotional distress) and Eighth cause of action (medical monitoring) are dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

The motion is otherwise denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 8, 2013

HON. DANIEL PALMIERI
Supreme Court Justice

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