SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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GLADYS R. CORRENTI,

Plaintiff,

-against-

BERTRAM D. STONE, INC., et al.,

Defendants.

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Index No. 190317/12
Motion Seq. 004

DECISION & ORDER

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Hollingsworth & Vose Company ("H&V") moves pursuant to CPLR 3212 for partial summary judgment dismissing plaintiff Gladys R. Correnti's ("Plaintiff") fraud and negligent representation causes of action[1] on the grounds that such causes of action do not satisfy the heightened pleading requirements required by CPLR 3016(b)[2] and that H&V cannot be held liable for the alleged misrepresentations made by co-defendant Lorillard Tobacco Company, as to whom H&V denies any partnership or joint venture relationship.

BACKGROUND

H&V is a paper manufacturing business. In or about February 14, 1952, H&V's then subsidiary, H&V Specialties Co, Inc. ("Specialties")[3], entered into an agreement with

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1 The eleventh and twelfth causes of action, respectively, of Plaintiff's complaint against this defendant.

2 CPLR 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

3 Specialties merged into H&V in 1957.

P. Lorillard Company, a predecessor of Lorillard Tobacco Company (collectively "Lorillard"), to provide Lorillard with bulk filter media ("Agreement")[4] which Lorillard then used to manufacture Micronite filters for its Kent-brand cigarettes. H&V concedes that such bulk filter media produced by Specialties contained crocidolite asbestos. Lorillard stopped integrating Specialties' asbestos-containing filter media into Kent cigarettes in or about 1956.

Plaintiff was born in October of 1931. While currently a resident of Fort Meyers, Florida she lived in New York from birth until 1997. She was diagnosed with mesothelioma in September of 2011. Plaintiff's third amended complaint which alleges the causes of action at issue herein was filed on October 24, 2012.[5] Plaintiff was deposed on November 29, 2012. In relevant part she testified that she smoked between half a pack and a full pack of Kent cigarettes per day from 1952 to 1972, that she never had any communications with anyone from H&V, had no recollection of seeing any advertisements by H&V, and had not heard of H&V prior to filing this lawsuit.

On this summary judgment motion H&V asserts that Plaintiff's fraud and negligent misrepresentation causes of action against it must be dismissed because they have not been plead in sufficient detail and that Plaintiff has not established any of the necessary elements thereof. H&V also asserts that Plaintiff's deposition testimony fails to implicate it in any of the fraudulent acts alleged by Plaintiff and fails to show any privity between it and Plaintiff. In opposition, Plaintiff argues that H&V's relationship as Lorillard's partner and/or joint venturer renders it equally responsible for Lorillard's tortious misrepresentations insofar as it advertised the safety

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4 A copy of the Agreement is submitted as Plaintiff's exhibit C.

5 A copy of Plaintiff's third amended complaint is submitted as defendant's exhibit A ("Complaint").

and health benefits of its Micronite filters (which in truth contained asbestos) compared to the filters found in other cigarettes. H&V vigorously denies any such relationship with Lorillard and argues that it cannot be held responsible for any of Lorillard's independent acts.

DISCUSSION

A party moving for summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). Should the movant satisfy its *prima facie* burden, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of the action. *Winegrad, supra*; *Zuckerman, supra.*

To make a claim for fraud in New York the plaintiff must allege "a representation of material fact, falsity, scienter, reliance and injury. . . . The circumstances constituting the fraud must be stated in detail (CPLR 3016 [b])." *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). To make out a claim for negligent misrepresentation, the plaintiff must show "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *US Express Leasings, Inc., supra*, at 497 (quoting *J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 [2007]).

In *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-92 (2008), the Court of Appeals explained that:

> The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016(b) should not be so strictly interpreted "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'" (*Lanzi v Brooks*, 43 NY2d 778, 780, 373 NE2d 278, 402 NYS2d 384 [1977], *quoting Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194, 239 NE2d 197, 292 NYS2d 98 [1968]).
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> Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct . . . . [6]

More recently the Court of Appeals addressed pleading standards under CPLR 3016(b) in *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 (2009), in which a hedge fund sued a law firm in connection with its drafting of the hedge funds' offering memoranda. When the value of the fund plummeted, plaintiffs sued alleging that the offering documents misrepresented the fund's audit position. The Court noted that plaintiffs' bare allegation that the law firm at some point learned of the alleged misrepresentations in the offering memoranda were conclusory and thus did not satisfy CPLR 3016(b). The *Eurycleia* court's analysis of CPLR 3016(b) is also instructive (*id.* at 559):

> We recently explored the pleading requirements of CPLR 3016 (b) in *Pludeman v Northern Leasing Sys., Inc.* . . . In that case, we noted that the purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents. We cautioned that the statute "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it

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6 *Pluderman's* reasonable inference standard was applied by the Court of Appeals in *Sargiss v Magarelli*, 12 NY3d 527 (2009), in which the plaintiff sued the brother of her decedent ex-husband, among others, for allegedly aiding her ex-husband in fraudulently misrepresenting the value of his net worth during their divorce proceedings. The plaintiff alleged that her ex-husband had fraudulently misrepresented his net worth by assigning no value to his interest in a company that owned several shopping centers. Following the divorce, the plaintiff discovered documents suggesting that her ex-husband maintained a valuable interest in that company. The Court found that the complaint permitted an inference that the plaintiff's former brother-in-law had participated in the fraud.

may be impossible to state in detail the circumstances constituting a fraud" (*id.* at 491, [internal quotation marks and citation omitted]). Although there is certainly no requirement of "unassailable proof" at the pleading stage, the complaint must "allege the basic facts to establish the elements of the cause of action" (*id.* at 492). We therefore held that CPLR 3016 (b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (*id.*). And, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*id.* at 493).

Plaintiff's Complaint, which alleges in part as follows, satisfies these standards (Complaint ¶¶ 22-23):

22. Defendants HOLLINGSWORTH & VOSE CO. and LORILLARD TOBACCO CO. (hereinafter "CIGARETTE DEFENDANTS") intentionally made false representations that harmed plaintiff, GLADYS R. CORRENTI.

23. CIGARETTE DEFENDANTS entered into a partnership to jointly produce a Micronite cigarette filter which contained crocidolite asbestos that would be incorporated into Kent brand cigarettes. Pursuant to an agreement signed on or about February 14, 1952, CIGARETTE DEFENDANTS agreed that they would jointly own the Micronite filter business, including joint ownership of the filter technology and patent, equal payment of all costs to develop the filter, joint ownership of the facilities and machinery to produce the asbestos-containing filter, and equal payment of litigation costs arising out of the filter patent. Pursuant to CIGARETTE DEFENDANTS' joint venture, HOLLINGSWORTH & VOSE CO. provided LORILLARD TOBACCO CO. with filter material composed of approximately 30% crocidolite asbestos mixed with cotton, crepe paper and cellulose acetate. HOLLINGSWORTH & VOSE CO. participated jointly with LORILLARD TOBACCO CO. in all aspects of the creation and marketing of Kent asbestos-containing cigarettes, including the Kent advertising and marketing campaigns based on false health claims. Correspondence and admissions of HOLLINGSWORTH & VOSE CO.'s technical director, Dr. Harold Knudson, establish that HOLLINGSWORTH & VOSE CO. knew that asbestos in the Kent cigarette filters was hazardous and that health claims to the contrary were false and unfounded. HOLLINGSWORTH & VOSE CO. was aware that LORILLARD TOBACCO CO. planned to falsely represent that its Kent cigarettes with asbestos-containing filters were healthy, safe and completely harmless, and HOLLINGSWORTH & VOSE CO. agreed with LORILLARD TOBACCO's action in this intentionally false representation and intended that the false representation of health claims be committed.

The Complaint further alleges that the defendants' false representations regarding the health benefits of Kent cigarettes compared to other brands were made through print, radio, and

television advertisements (¶ 24); that both defendants concealed the fact that Kent cigarettes contained asbestos even though they knew asbestos was carcinogenic (¶ 27); and that the Plaintiff relied on these false representations to her detriment in choosing to smoke Kent cigarettes (¶¶ 33, 36). I find that such allegations, assuming they are true, permit a reasonable inference that Lorillard and H&V committed the torts of which Plaintiff complains as partners and/or joint venturers in the manufacture and sale of asbestos-containing filter material. Accordingly, that branch of H&V's motion which seeks dismissal of Plaintiff's fraud and negligent misrepresentation causes of action for failure to meet the pleading requirements of CPLR 3016(b) is denied. *See Pluderman, supra*; *Eurycleia Partners, supra*.

Ancillary to the fraud issue is whether Plaintiff has proffered sufficient evidence to show that Specialties and Lorillard actually were joint venturers in the manufacture and sale of asbestos-containing filter material such that H&V could be held liable for Lorillard's alleged tortious conduct. See Partnership Law §§ 24-26 (joint venturers are jointly and severally liable to third parties for any wrongful act or omission of any other joint venturer). A joint venture is a "'special combination of two or more persons where in some specific venture a profit is jointly sought'" *Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 (1988) (quoting *Forman v Lumm*, 214 AD 579, 583 [1st Dept 1925]). It is "in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership." *Eskenazi v Schapiro*, 27 AD3d 312, 314-15 (1st Dept 2006) (quoting *Gramercy Equities Corp*, *supra*, at 565). "The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or

knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses. . . ." *Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 (1st Dept 2003); *see also Dinaco, Inc. v Time Warner*, Inc., 346 F.3d 64, 67 (2d Cir. 2003). While a "definite agreement with respect to the sharing of profits and losses . . . is an indispensable element of any joint venture agreement, oral or written" (*Schnur v Marin*, 285 AD2d 639, 640 [2d Dept 2001]) the sharing of losses may be inferred. *Penato v George*, 52 AD2d 939, 942 (2d Dept 1976) ("[t]he law will imply an agreement to share losses.") The court is "not bound by the disclaimer of partnership, joint venture or agency between the parties in determining their true relationship. . . ." *Rubenstein v Small*, 273 AD 102, 104 (1st Dept 1947). "Generally, the issue of the existence of a joint venture presents a question of fact for the trier of fact to determine . . . ." *RCR Builders v Batex Contr. Corp.*, 230 AD2d 897, 898 (2d Dept 1996).

As Plaintiff points out, among other things the Agreement provides: (1) that H&V and Lorillard would jointly own certain patents relating to the filter materials at issue and would jointly seek to exploit their ownership thereof[7]; (2) that H&V and Lorillard would share their "know how" relating to the development and production of filter materials[8]; (3) that H&V and Lorillard would share in the cost to "develop the use of the processes, inventions and/or improvements in the making of tobacco smoke filter material" and would jointly own any "plant, facilities, equipment and machinery" purchased therefor[9]; and (4) that Lorillard would indemnify H&V for any litigation that arose out of their partnership relating to "misrepresentation by

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7 Agreement p. 2.

8 Agreement ¶¶ 1(c), 4.

9 Agreement ¶¶ 8, 9.

Lorillard as to the tobacco smoke filter material" and "any harmful effects of any finished products sold by Lorillard."[10] The Agreement also provides for the equal division of royalties derived from the parties' licensing of their filter technology or the filing of foreign patents.[11]

H&V's contention that there could be no joint venture between Lorillard and Specialities because they did not explicitly agree to share the profits and losses from Lorillard's manufacture, sale or marketing of original Kent cigarettes is a red herring. The fact is that whether or not Lorillard manufactured and sold Kent cigarettes, Specialties and Lorillard jointly developed, manufactured, and patented the technologies and processes associated with the production of the asbestos-containing bulk filter material incorporated into such cigarettes. They jointly owned the "right, title, and interest"[12] in the inventions associated therewith, jointly bore the costs to obtain patents therefor, and would have benefitted on an equal basis from any license of their production and processes to third parties. H&V and Lorillard's intent to share in the profits from their jointly owned inventions is clearly evidenced by reason of these provisions and indeed the terms of the Agreement as whole.

H&V is not entitled to summary dismissal on this issue even though the Agreement may not explicitly "contemplate, nor discuss, tort liability or other types of liability . . . ." *Dundes v Fuersich*, 6 Misc. 3d 882, 885 (Sup. Ct. NY. Co. 2004); *see also Penato, supra*. As the First Department recognized in *Cobblah v Katende*, 275 AD2d 637 (1st Dept 2000), a joint venture may exist even where there is no explicit agreement to share losses if "there was no reasonable

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10 Agreement ¶ 23.

11 Agreement ¶¶ 7, 17.

12 Agreement p. 2.

expectation that there would be any losses." *Id.* at 639; *see also P.F.G. Indus. v Tel-Glass, Inc.*, 49 AD2d 112, 114 (1st Dept 1975) (failure to allege agreement to share losses was not fatal to joint venture that involved a single transaction that was concluded profitably). Where, as here, the terms of the Agreement signal that both Lorillard and Specialties envisioned significant earnings and did not contemplate having losses (*see Dundes, supra*), there is a triable material question whether Lorillard and Specialities were joint venturers. *RCR Builders, supra*.

H&V does not dispute on this motion that Lorillard's advertisements for Kent cigarettes were misleading. It is noteworthy, however, as the record indicates that Lorillard represented to the public that Micronite filters were completely harmless despite their actual knowledge that asbestos was hazardous, and that such representations enticed Ms. Correnti to smoke Kent cigarettes over other brands. At a minimum, this raises an issue of fact on Plaintiff's fraud and negligent misrepresentation claims.

CONCLUSION

In sum, there are triable issues of fact whether Lorillard misrepresented the nature of its Kent cigarettes and whether H&V may be liable for such misrepresentations as Lorillard's joint venturer. Accordingly, it is hereby

ORDERED that Hollingsworth & Vose Company's motion for partial summary judgment dismissing Plaintiff's fraud and negligent representation causes of action against it is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 3.3.14

SHERRY KLEIN HEITLER J.S.C.