

Gabris v 3M Co.

2018 NY Slip Op 32056(U)

August 22, 2018

Supreme Court, New York County

Docket Number: 190259/2017

Judge: Manuel J. Mendez

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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 STEPHEN GABRIS,

Plaintiff,

- against -

3M COMPANY, et al,

Defendants.

INDEX NO. 190259/2017

MOTION DATE 07/25/2018

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on R.J. Reynolds Tobacco Company's motion to dismiss and/or transfer the Complaint:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Repeating Affidavits.

Upon a reading of the foregoing cited papers, it is Ordered that Defendant R.J. Reynolds Tobacco Company's ("RJ Reynolds") motion to transfer this action to a non-asbestos part and/or dismiss Plaintiff's Complaint and all Cross-Claims against it pursuant to CPLR §3211(a)(7) and (5), is granted to the extent that Plaintiff's Fourth cause of action is dismissed. The remainder of RJ Reynolds' motion is denied.

Plaintiff Stephen Gabris was diagnosed with non-small cell lung cancer on July 31, 2017 (Opposition Papers Ex. 1). Plaintiff alleges he was exposed to asbestos in a variety of ways. The Plaintiff commenced this action on September 9, 2017 to recover for injuries resulting from Mr. Gabris' exposure to asbestos. Pursuant to the New York City Asbestos Litigation Docket ("NYCAL") and Case Management Order ("CMO"), discovery was exchanged and Plaintiff's deposition was taken (Id at Exs. 2, 3, 5, 6). The discovery exchanged delved into Mr. Gabris' life-long smoking habit beginning in approximately 1970, at the age of sixteen (16) through April 2017 (Id at Ex. 3). Plaintiff smoked approximately half-a-pack to one pack a day of Newport Light cigarettes (brand would vary occasionally, (Id).

Plaintiff amended the Complaint on February 9, 2018 adding RJ Reynolds as a Defendant and made smoking-related claims (Id at Ex. 7). RJ Reynolds served, and Plaintiff responded to, Request for Supplemental Interrogatories and conducted two (2) additional discovery depositions- the first ranging two (2) days- which revolved around Plaintiff's cigarette exposure and smoking habits (Id at Exs. 8, 9, 10, 12).

RJ Reynolds now moves to transfer all causes of action against it out of the NYCAL docket, and/or dismiss the action pursuant to CPLR §3211 (a)(7), or in the alternative, dismiss Plaintiff's claims for punitive damages against RJ Reynolds pursuant to CPLR §3211(a)(5).

RJ Reynolds contends that this court should transfer all causes of action against it out of the NYCAL docket because Plaintiff has not plead any asbestos claim against it. RJ Reynolds argues that Plaintiff's Second, Third and Fourth Causes of Action alleging fraudulent concealment, failure to warn, and negligent advertising and marketing should be dismissed because these claims are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 et seq. ("The Labeling Act"). RJ Reynolds further contends that Plaintiff's Second Cause of Action for fraudulent misrepresentation and concealment should be dismissed because the Plaintiff failed to plead the claim with

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

specificity. Finally, RJ Reynolds contends that Plaintiff's claims for punitive damages against it should be dismissed because they are barred under the doctrine of *res judicata*, through the New York Attorney General's *parens patrie* settlement with major tobacco companies, including RJ Reynolds.

Plaintiff opposes the motion contending that the claims against RJ Reynolds should remain in the NYCAL Docket because RJ Reynolds is a proper Defendant since the claims against it and the asbestos defendants are inextricably intertwined. Plaintiff further contends that the Amended Complaint properly pleads fraud with the requisite specificity and that the Labeling Act does not preempt his causes of action. Finally, Plaintiff contends his claims for punitive damages is not barred by *res judicata* because New York State had no standing to raise Plaintiff's claim when suing the tobacco companies in its *parens patrie* capacity.

"On a motion to dismiss pursuant to CPLR §3211, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 729 NYS2d 425, 754 NE2d 184 [2001]). A motion to dismiss should only be granted if, assuming all allegations are true, the substantive law does not recognize a cause of action (*Id.*).

NYCAL Docket:

The CMO in its applicable part states: "[t]his CMO applies to proceedings in asbestos personal injury and wrongful death cases now or hereafter assigned to the NYCAL, except as otherwise directed by the Coordinating Judge of NYCAL upon motion" (Case Management Order ¶I). There is no express language limiting NYCAL to asbestos defendants, but rather, the plaintiff must suffer personal injury and/or wrongful death due to asbestos exposure.

Permissive joinder of parties is authorized provided that the claims asserted arise "out of the same transaction, occurrence, or series of transactions or occurrences and involve a common question of law or fact" (CPLR §1002[b]). New York courts use permissive joinder liberally to permit the trial of connected issues and facilitate judicial economy (N.Y. Hosp.-Westchester Div. v Krauskopf, 98 AD2d 667, 469 NYS2d 408 [1st Dept. 1983]).

Maryland's Court of Appeals decision in *R.J. Reynolds Tobacco Co. v Stidham*, 448 Md. 497, 141 A3d 1 (2016) is instructive. There, the court provided guideline on how the lower courts should approach the issue of joining asbestos defendants with tobacco defendants by analyzing two lower court decisions. Before its well-reasoned analysis, the court expressed concern on whether the lower courts intended to deny every synergy case without taking into consideration the particular circumstances of each case, which would be a violation of local rules (*Id.*; discussing *Gress v Acands*, 150 Md. App. 369 (2003), reversed *sub nom Brown v. Gress*, 378 Md. 667 (2003), *Gress/Brown*).

The Court of Appeals then detailed the reasoning of the Circuit Court and Court of Special Appeals decisions in *Gress*. The Circuit Court denied joinder of claims because it found that (i) those claims involve different kinds of products, method of distribution, and uses, (ii) the case against the asbestos defendants is governed by the special procedures that are reserved for asbestos cases, and (iii) significant problems would arise either in subjecting tobacco companies to those procedures or having separate procedures for the two sets of defendants (*Id.*).

The Court of Special Appeals decision disagreed with the Circuit Court in *Gress*. The Court of Special Appeals held that joinder would have been appropriate if the issue had not been moot because (i) the claims against the two sets of defendants were related and arose out of the same series of occurrences, (ii) the case involved numerous common questions of law and fact, including whether there is scientific merit in the synergy theory, and (iii) concern that, if the cases were severed, each defendant would attempt to prove

the other was solely responsible or responsible for the greater part of the damage, to minimize recovery (*Id citing to Stidham v R.J. Reynolds Tobacco Co., 224 Md. App. 459*).

The Court of Appeals found both courts concerns and reasoning legitimate and added two further concerns: (i) plaintiffs did not attempt to join the tobacco defendants at the outset but waited a year in one case and fifteen (15) months in another; and generally (ii) whether the joinder of asbestos and tobacco defendants raises the issue of the extent to which, if at all, the special procedures applicable to asbestos cases should extend to tobacco companies" (*Id*). The Court of Appeals concluded that for future cases, where joinder was timely, it would be incumbent on plaintiffs seeking to join tobacco and asbestos defendants to address all these issues objectively and in detail and for the court to give fair consideration to all proposals and objections.

Adhering to the CMO, New York case law and following the Court of Maryland's instructive holding in *RJ Reynolds*, Plaintiff's claims against RJ Reynolds should remain in this action and not be transferred out of the NYCAL Docket. Plaintiff alleges he developed lung cancer due to his exposure to asbestos and his life-long smoking habit. In accordance with the synergy theory, smoking increases the probability that someone exposed to asbestos will develop lung cancer. While smoking cigarettes and exposure to asbestos are each capable of causing lung cancer on its own, the combination creates common questions of law and fact, and intertwines both actions.

Joinder of these claims is favorable in this action for the following reasons: (i) the claims against RJ Reynolds and the Asbestos Defendants are related because smoking and asbestos exposure occurred during the same period of time (ii) there are common questions of law and fact, (iii) if the cases were severed, it would create a situation where each defendant would try to prove that the other was solely responsible or responsible for the greater part of the damage, to minimize Plaintiff's recovery. Furthermore, since the Plaintiff alleges synergistic effects of asbestos and tobacco exposure, RJ Reynolds contention that the action against it should be labeled a "non-asbestos case" is unavailing as the causes of action are based in part on the effects of asbestos exposure. Finally, severing the action would force the Plaintiff to, in essence, try the same case twice with the possibility of conflicting outcomes.

The court's two main concerns outlined in the Maryland Court of Appeals *RJ Reynolds* decision do not outweigh the benefits of having Plaintiff's allegations against RJ Reynolds remain in this action. Plaintiff moved to amend the Complaint and add RJ Reynolds as a Defendant only five (5) months after commencing this action. As a result, RJ Reynolds has participated in the discovery process, including taking the Plaintiff's deposition twice, and having the Plaintiff respond to interrogatories specific to RJ Reynolds. Therefore, in this specific action, the Plaintiff timely added RJ Reynolds. RJ Reynolds ability to defend the allegations has not been prejudiced, thereby complying with the ideals of the NYCAL docket laid out in the CMO. In the interest of judicial economy, it is proper, in this specific action, to allow the jury to determine whether Plaintiff's lung cancer was caused by the conduct of the Asbestos Defendants or RJ Reynolds, or to apportion the culpability each Defendant may or may not have.

Preemption

The Labeling Act "established a comprehensive scheme of Federal regulation of cigarette advertising and labeling with respect to the health effects of smoking (*Small v Lorillard Tobacco Co., 252 AD2d 1, 679 NYS2d 593 [1st Dept. 1998]*). The [Labeling] Act is designed to ensure that consumers nationwide receive adequate, clear, uniform information about the dangers of smoking" (*Id*). The Labeling Act's express preemption clause states, in its relevant part at Section 1334:

(a) Additional Statements: No statement relating to smoking and health, other than the statement required by section [1333 of this title], shall be required on any cigarette package.

(B) State regulations: No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(*Id.*) Matters outside the scope of this express preemption provision are not preempted (*Id.*). The Labeling Act before amendment in 1969 does not preempt state law damages actions (*Cipollone v Liggett Grp.*, 505 U.S. 504, 112 S. Ct. 2608 [1992]). After the amendments of 1969, the Labeling Act preempts claims based on failure to warn and neutralization of federally mandated warnings to the extent that those claims relied on omissions or inclusions in manufacturers' advertising or promotion. However, the Labeling Act does not preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy (*Id.*).

Plaintiff's Fourth Cause of Action based on failure to warn as a result of negligent advertising and marketing is foreclosed by the Supreme Court's interpretation and must be dismissed. Plaintiff began smoking in the 1970s, after the amended Labeling Act took effect. The Labeling Act expressly preempts state claims based on failure to warn and neutralization of federally mandated warnings to the extent that those claims relied on omissions or inclusions in a manufacturers' advertising.

However, Plaintiff's Second and Third Causes of Action based on fraudulent concealment, and failure to warn *outside* of advertising and promotion, are not preempted by the Labeling Act. Plaintiff specifically alleged that RJ Reynolds failed to "warn or advise consumers outside of advertising and promotion... of the specific damages and hazards of smoking mentholated cigarettes including addiction, lung cancer and other diseases... through public statements on television, newspaper, radio, magazines, publications, pamphlets, or other available media" (Moving Papers Ex. B Pgs. 25-26). Therefore, Plaintiff's Second and Third Causes of Action should not be dismissed as they are not preempted by the Labeling Act.

Fraudulent Misrepresentation and Concealment

Fraudulent misrepresentation and concealment must be pled with specificity (CPLR §3016[b]). A claim for fraudulent misrepresentation requires a plaintiff to show: (i) the defendant made a material false representation, (ii) the defendant intended to defraud the plaintiff, (iii) the plaintiff reasonably relied upon the representation, and (iv) the plaintiff suffered damages as a result of reliance upon the misrepresentation (*Swersky v Dreyer & Traub*, 219 AD2d 321, 643 NYS2d 33 [1st Dept. 1996]). The complaint must "allege basic facts to establish the elements of the cause of action; and the plaintiff need not provide unassailable proof" (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 860 NYS2d 422, 890 NE2d 184 [2008]).

Plaintiff's Complaint sufficiently pled allegations in support of his claims of fraudulent misrepresentation and concealment against RJ Reynolds. Plaintiff has offered sufficient facts to show RJ Reynolds knew about the health hazards of smoking, and concealed information, including research on the addictiveness of nicotine, and publicly denied that cigarettes were addictive or caused cancer. Finally, as a result of RJ Reynolds alleged fraudulent misrepresentation, it is alleged the Plaintiff developed a life-long smoking habit.

Punitive Damages

"Under *res judicata* a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 690 NYS2d 478, 712 NE2d 647 [1999]). Generally, for the doctrine of *res judicata* to be applied, the parties to the prior and current action must be identical (*Am. Preferred Prescription v Cont'l Pharmacy*, 216 AD2d 33, 627 NYS2d 390 [1st Dept. 1995]).

"In limited circumstances, *res judicata* may bar the claims of non-parties to a prior proceeding where they were adequately represented by someone with the same interests who was a party. To assess whether a state entity adequately represented the interests of its non-party citizens in a prior litigation, courts have generally looked to the concepts underlying the doctrine of *parens patrie*" (Lucas v Planning Bd., 7 F. Supp. 2d 310 [SDNY 1998]).

The doctrine of *parens patrie* holds that "the state has standing to sue as representative of its citizen only where it can allege injuries... to interests which affect her citizens at large" (*Id.*). "Courts have held consistently that claims by private plaintiff-citizens may be precluded by prior state litigation to the extent that such claims do not seek redress for private interests or individual rights above and beyond the general public interest asserted by the state in the prior proceeding" (*Id.*). "However, New York's standing to seek compensation for economic loss New York suffered as a result of the contumacious conduct does not extend to the vindication of the private interests of third-parties" (New York v Operation Rescue Nat'l, 80 F.3d 64 [2d Cir. 1996]).

Plaintiff's claims for punitive damages is not barred by *res judicata*. New York was not in privity with Mr. Gabris in its previous action against RJ Reynolds and Mr. Gabris' punitive damages claims against RJ Reynolds was not, and could not have been, asserted by New York in its prior lawsuit against RJ Reynolds. New York did not pursue nor had standing to pursue private claims for compensatory or punitive damages on behalf of Mr. Gabris based upon personal injuries caused by cigarette smoking, thus making the doctrine of *res judicata* inapplicable here.

Plaintiff's allegations in the Complaint that RJ Reynolds "intentionally manipulated the levels of nicotine and menthol in its cigarettes...to make them more addictive and easier to smoke" (Opposition Papers Ex. 7 P. 11, 12, 47), if proven true, could potentially rise to the level of warranting punitive damages, which are intended to punish misconduct as well as "afford the injured party a personal monetary recovery over and above compensatory loss" (Wittman v Gilson, 70 NY2d 970, 525 NYS2d 795, 520 NE2d 514 [1988]). It is inappropriate for the court to dismiss Plaintiff's claims for punitive damages at this stage.

Accordingly, it is ORDERED, that Defendant R.J. Reynolds Tobacco Company's motion to transfer this action to a non-asbestos part and/or dismiss Plaintiff's Complaint and all Cross-Claims against it pursuant to CPLR §3211(a)(7) and (5), is granted to the extent that Plaintiff's Fourth Cause of Action is dismissed, and it is further,

ORDERED, that Plaintiff's Fourth Cause of Action against Defendant R.J. Reynolds Tobacco Company is severed and dismissed, and it is further,

ORDERED, that the remaining Causes of Action asserted in Plaintiff's Complaint against Defendant R.J. Reynolds Tobacco Company remain in effect, and it is further,

ORDERED, that the remainder of RJ Reynold's motion is denied, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Dated: August 22, 2018

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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