

Black v Brenntag N. Am.
2018 NY Slip Op 32802(U)
November 1, 2018
Supreme Court, New York County
Docket Number: 190016/2017
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 MARY BLACK and DAVID BLACK,

Plaintiff(s),

INDEX NO. 190016/2017

- against -

MOTION DATE 10/24/2018

BRENNTAG NORTH AMERICA, as successor-in-interest to Mineral Pigment Solutions, Inc., as successor-in-interest to Whittaker, Clark & Daniels, Inc., et al., Defendants.

MOTION SEQ. NO. 013

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on Colgate-Palmolive Company's motion to dismiss:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Colgate-Palmolive Company's ("Colgate") motion pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiffs' Sixth Amended Complaint and, alternatively, dismissing the Sixth Amended Complaint's causes of action for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud is granted to the extent that Plaintiffs' causes of actions for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud are dismissed.

Plaintiff, Mary Black, diagnosed with mesothelioma in November 2016, commenced this action on January 12, 2017 to recover for injuries sustained from her asbestos exposure (Opposition Papers Exh. A). On January 30, 2017 Mrs. Black filed an amended complaint, adding Colgate as an additional defendant (NYSCEF Docket No. 5). On February 21, 2017 and May 10, 2017 she filed her second and third amended complaints to add additional defendants (Id. No. 11 and 27). Thereafter, David Black was added as an additional plaintiff on June 29, 2017 by Plaintiff's fourth amended complaint (Id. No. 33). On March 5, 2018 Plaintiffs then filed their fifth amended complaint, adding an additional defendant (Id. No. 554) and on May 24, 2018 a sixth amended complaint (the "Amended Complaint"). Plaintiffs' Amended Complaint added additional causes of action.

Colgate now moves pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiff's Amended Complaint. It contends that Plaintiffs did not seek leave to file the Amended Complaint and that it is prejudiced by the amendment. It further contends that the Amended Complaint should be dismissed because it states new causes of action which are not predicated on new factual allegations when discovery has already taken place.

Plaintiffs oppose Colgate's motion. They contend that the Amended Complaint complies with New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO") and NYCAL's long-standing practice to permit amended complaints without leave of court. Additionally, Plaintiffs contend that Colgate is not prejudiced. Lastly, Plaintiffs withdraw the Amended Complaint's Fourth Count for Premises Liability, Labor Law, and NYS Industrial Code

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

Violations; Fifth Count for Contractors and Sub-Contractors Liability; and Sixth Count for Liability for "Dust Mask" Defendants (Plaintiff Aff. at 1, para. 3).

"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 fall within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp. 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR §3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways: on the one hand, the motion may be used to dispose of an action in which the plaintiff has not state a claim cognizable at law; on the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action (Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 980 N.Y.S.2d 21 [1st Dept. 2014]).

Colgate's argument that Plaintiffs' Amended Complaint should be dismissed because Plaintiffs did not seek leave of court is unavailing. The CMO provides that the Plaintiffs may amend their complaint as of right. Specifically, it states that "[a]ny plaintiff may, without further leave of the Court, amend her complaint, subject to the limitations stated in this CMO" (CMO §VII (B)). Such limitations exist when (1) a Plaintiff seeks to add a claim for punitive damages and (2) when a Plaintiff seeks to move an action from the deferred docket to the active or accelerated docket (see *Id.* §VII.C and §XVI.A). Because these situations are not present here, Plaintiffs' complaint was properly amended.

Colgate contends that Plaintiffs' Breach of Warranty claim is time-barred because Plaintiffs failed to assert this claim within UCC §2-725's four-year statute of limitation. Colgate further contends that the Plaintiffs cannot revive this claim under the Toxic Tort Revival Statute because warranty claims are based on breach of contract, and not on tort. Thus, Colgate contends that the Toxic Tort Revival statute is not a basis to resurrect Plaintiffs' warranty claim.

Plaintiffs' claim for Breach of Warranty is time-barred under the UCC §2-725. UCC §2-725 provides that "(1) [a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued ... and (2) [a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge." Plaintiff Mary Black testified she stopped using Cashmere Bouquet in 1973 (Black Dep. at 336). Thus, her Breach of Warranty claim should have been brought in or around 1977. Therefore, pursuant to UCC §2-725's four-year statute of limitation, Plaintiffs' Breach of Warranty claim is untimely.

Plaintiffs cannot revive their Breach of Warranty claim under the Toxic Tort Revival Act. The Toxic Tort Revival Act was codified under CPLR §214-c. Specifically, "[i]n 1986, the Legislature enacted chapter 682 of the Laws of 1986, which amended the CPLR to add section 214-c to replace the exposure rule with a balanced and more equitable discovery accrual mechanism (CPLR 214-c [2]). It also allowed for a limited revival of foreclosed claims (L 1986, ch 682, § 4) (Rothstein v. Tennessee Gas Pipeline Co., 87 N.Y.2d 90, 661 N.E.2d 146, 637 N.Y.S.2d [1995]). Colgate's argument that Plaintiffs cannot revive their Breach of Warranty claim under the Toxic Tort Revival Act is correct. Nowhere does CPLR §214-c's language revive Breach of Warranty claims, or any claim of a contractual nature. The plain language of the statute indicates that CPLR §214-c is limited to claims for personal injury and property damage (see CPLR §214-c(2)). Thus, Plaintiffs Breach of Warranty claim is dismissed.

Colgate contends that the Amended Complaint's Seventh Count for Civil Conspiracy and Fraud should be dismissed because they are not properly pled. It

also contends that these causes of actions find no factual support in Plaintiffs' Initial or Amended Complaint.

CPLR §3016(b) states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." "To make out a cause of action for fraud, ... 'a party must allege representation of a material existing fact, falsity, scienter, deception and injury'" (Megaris Furs, Inc. v. Gimbel Bros., Inc., 172 A.D.2d 209, 568 N.Y.S.2d 581 [1st Dept. 1991] citing Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 [1919]). "Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016(b), which requires, in the case of a cause of action based on fraud, that 'the circumstances constituting the wrong shall be stated in detail'" (Id). "[M]ere conclusory language, absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic Nat. Title Ins. Co. v. Cardinal Abstract Corp., 14 A.D.3d 678, 790 N.Y.S.2d 143 [2nd Dept. 2005]).

Plaintiffs Initial Complaint failed to plead fraud with CPLR §3016(b)'s required specificity. Plaintiffs' Amended Complaint does not plead fraud with CPLR §3016(b)'s requisite specificity (see Amended Complaint at 19-21). The allegations in Plaintiffs' Amended Complaint are conclusory, they do not identify Colgate, nor do they state Colgate's role in the alleged fraudulent conspiracy. Furthermore, Plaintiffs' Initial Complaint does not assert factual allegations to sustain a claim for fraud (Opposition Papers Exh. A). Because Plaintiffs pled fraud generally, as to "all defendants" (Id. at 20), the Amended Complaint does not meet CPLR §3016(b)'s requisite level of specificity, and thus fails to state a claim for fraud.

Plaintiffs fail to state a claim for civil conspiracy. New York does not recognize civil conspiracy to commit a tort as an independent cause of action (Sokol v. Addison, 293 A.D.2d 600, 742 N.Y.S.2d 311 [2nd Dept. 2002]). To "establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury'" (Abacus Fed. Sav. Bank v. Lim, 75 A.D. 3d 472, 905 N.Y.S. 2d 585 [1st Dept. 2010] citing World Wrestling Fedn. Entertainment, Inc. v. Bozell, 142 F. Supp. 2d 514, 532 [SD NY 2001]). "[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort (Romano v. Romano, A.D.3d 767 N.Y.S.2d 841 [2nd Dept. 2003]). Here, because Plaintiffs' underlying Fraud claim fails, Plaintiffs' claim for Civil Conspiracy also fails. Therefore, it is dismissed.

Plaintiffs oppose Colgate's motion. They contend that their Initial Summons and Complaint pled allegations that gave Colgate notice of their Third Count for Breach of Warranty, and thus it relates back to the Initial Complaint. This argument is unavailing. The fact that Plaintiffs' Initial Complaint pled facts that alleged a Breach of Warranty claim (see Opposition Papers Exh. A 20) does not save Plaintiffs' claim from being dismissed under the statute of limitations. As stated above, Plaintiffs' Breach of Warranty claim is time-barred. It has been time-barred since about 1977. Additionally, a Breach of Warranty claim is contractual in nature, and thus has no basis for revival under CPLR §214-c. In any case, Plaintiffs show no opposition to Colgate's argument on this point. Therefore, Plaintiffs' Breach of Warranty claim is dismissed.

Plaintiffs contend that its Initial Summons and Complaint pled allegations that gave Colgate notice of their Seventh Count for Civil Conspiracy and Fraud and that these claims are premised upon the same subject matter alleged in the

Initial Complaint. This argument is also unavailing. Plaintiffs' Fraud claim is not pled with specificity, neither in the Initial Complaint nor in the Amended Complaint. Moreover, the fact that Plaintiffs pled allegations in the Initial Complaint that gave Colgate notice of their Fraud claim is irrelevant to Plaintiffs' failure to meet CPLR §3016(b)'s level of specificity. Because Plaintiffs do not meet this threshold, their complaint fails to state a cause of action for fraud. Plaintiffs' Civil Conspiracy claim is dismissed because it cannot stand alone. Lastly, Plaintiffs have withdrawn their causes of action for Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, and Liability for Dust Mask Defendants.


ACCORDINGLY, it is ORDERED that Defendant Colgate-Palmolive Company's ("Colgate") motion pursuant to CPLR §3211(a)(5) and (7) to dismiss Plaintiffs' Sixth Amended complaint and, alternatively, dismissing the Sixth Amended Complaint's causes of action for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud is granted to the extent that Plaintiffs' causes of actions for Breach of Warranty, Premises Liability, Labor Law and NYS Industrial Code Violations, Liability for Contractors and Subcontractors, Liability for Dust Mask Defendants, and Civil Conspiracy and Fraud are severed and dismissed, and it is further,

ORDERED that the Defendant Colgate-Palmolive Company serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: November 1, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE