

Garrido v Avon Prods., Inc.
2018 NY Slip Op 32909(U)
November 13, 2018
Supreme Court, New York County
Docket Number: 190358/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13IN RE: NEW YORK CITY ASBESTOS LITIGATION

ANA ANGIE GARRIDO and JOSEPH GARRIDO,

INDEX NO. 190358/2016

Plaintiffs,

MOTION DATE 10/24/2018

- against -

MOTION SEQ. NO. 001

AVON PRODUCTS, INC., et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Johnson & Johnson and Johnson & Johnson Consumer Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint, is granted to the extent of dismissing the express warranty claim asserted in the third cause of action, the fourth, fifth, sixth, seventh, eighth and ninth causes of action. The remainder of the relief sought is denied.

Plaintiff, Ana Angelica a/k/a "Angie" Garrido, was diagnosed with peritoneal mesothelioma on or about October of 2016. She alleges that she has no known asbestos exposure except from the use of talcum powder products. Her exposure - as relevant to this motion - is allegedly from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson & Johnson Baby Powder ("JJP"). Mrs. Garrido alleges that she used the defendants' product daily from 1976 to 1989, and from 2000 to 2006.

At her deposition Mrs. Garrido testified that her mother used JJP from when she was born in 1976 until she was approximately thirteen (13) years old (Mot. Kurland Aff., Exh. 5, pg. 81, Exh. 6, pg. 60 and Opp. Exh. 2, pgs. 136-142). Mrs. Garrido's father, Robert Reices, testified at his deposition that when she was a baby Mrs. Garrido's mother would apply the powder after her bath and changing her diaper. JJP was applied to Mrs. Garrido by shaking it onto her private parts, then her mother would shake some into her hands and apply it to Mrs. Garrido's belly, neck and arms (Mot. Kurland Aff., Exh. 8, pg. 150). Mrs. Garrido specifically recalled her mother using JJP when she was eight or nine years old on a daily basis. She testified that after coming out of the shower and drying herself, her mother would apply JJP.

Mrs. Garrido described her mother as applying JJP using a "salt shaker method" sprinkling approximately five to six shakes on her chest and in her panties (Mot. Kurland Aff., Exh. 6 pg. 138, Opp. Exh. 2, p. 139). Mrs. Garrido applied JJP to herself in the same manner as her mother, starting at approximately ten years old until she was thirteen when she switched to a different manufacturer's talc product (Mot. Kurland Aff., Exh. 5, pg. 81). Mrs. Garrido did not recall reading the labels or other writing on the back of the JJP containers she used (Mot. Kurland Aff., Exh. 7, pg. 61).

Mrs. Garrido testified that she once again started using JJP on a daily basis after her first daughter was born in 2000. She used JJP on her first daughter for a few years, until she

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

was about three years old. Mrs. Garrido continued using JJBP after her second daughter was born in 2003 until 2006 (Mot. Kurland Aff. Exh. 5, pg. 82 and Exh. 7, pgs. 66-67, Opp. Exh. 2 pgs. 149 -150). She used JJBP in connection with diaper changes for both of her daughters approximately six or seven times a day, applying two or three sprinkles to their diapers each time (Opp. Exh. 2, pgs. 148-149).

Plaintiff, Joseph Garrido, testified that when his wife used JJBP on their daughters he saw "puffiness," as in a cloud of talcum powder (Opp. Exh. 85, pgs. 130-133).

Plaintiffs commenced this action on November 23, 2016 to recover for damages resulting from Mrs. Garrido's exposure to asbestos from defendants' products. Plaintiffs' Standard Complaint - incorporated into the Short-Form Complaint - asserts nine causes of action for: (1) negligence, (2) strict liability, (3) breach of warranty, (4) premises liability, Labor Law and NYS Industrial Code Violations, (5) liability for contractors and subcontractors, (6) liability for "dust mask" defendants, (7) civil conspiracy and fraud, (8) Joseph Garrido's claim for loss of consortium, and (9) punitive damages (Mot. Kurland Aff., Exh. 2).

Defendants, Johnson & Johnson (hereinafter referred to individually as "JJ") and Johnson & Johnson Consumer Inc.'s (hereinafter referred to individually as "JJCI") now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants' argument that plaintiffs are not expected to present any admissible evidence of exposure to asbestos, citing to expert testimony plaintiffs' "may" rely on, is unavailing.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (*Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Mrs. Garrido either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendants argument that plaintiffs have no evidence and cannot raise an issue of fact that Mrs. Garrido was exposed to asbestos from the use of JJBP or Shower to Shower during the relevant periods of 1976 to 1989 and 2000 to 2006, fails to establish a prima facie basis to obtain summary judgment.

Defendants apply the standards asserted in *Sean R. v. BMW of N. Am., LLC*, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016] and *In re New York City Asbestos Litigation (Mary Juni)*, 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept., 2017], arguing that summary judgment is warranted as to the plaintiffs' strict liability and negligence claims because of lack of causation. Defendants claim that there is no asbestos contamination from their products because: (1) the talc was sourced from asbestos free mines, (2) the mined talc was purified, (3) there were internal

tests to ensure the lack of contamination and (4) both government and independent tests confirmed the product was asbestos free. It is defendants' contention that their defense experts establish Mrs. Garrido was not exposed to asbestos through use of their products or that they caused her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. 9, 11, 12, 13, 14, 21, 23, and 25), FDA findings in 1976 (Mot. Kurland Aff. Exhs. 22), and the expert affidavits of Dana M. Hollins, MPH, CIH, Brent L. Finley, Ph.D., DABT and Mathew S. Sanchez, Ph.D., to establish that Mrs. Garrido was not exposed to asbestos through use of their products or that they caused her mesothelioma. Defendants rely on the affidavits of their experts Dana M. Hollins and Dr. Matthew S. Sanchez, claiming that during the periods relevant to Mrs. Garrido, JJB talc was obtained only from Vermont (1964, 1967, 1968 - 2003) and Guangxi, China (starting in 2003). They claim that Mrs. Garrido had no exposure to Italian Talc which was mined 1946-1964, 1967 or 1968.

Some of the articles, reports and studies annexed to the motion papers are dated during periods outside of Mrs. Garrido's exposure in 1976 to 1989, and 2000 to 2006 (See Mot. Kurland Aff. Exhs. 9, 13, 21 and 25).

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She is employed as a Principal Health Scientist by Cardno ChemRisk, a private scientific consulting firm. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers, and concludes cosmetic-grade talc has not been shown to be a risk factor for mesothelioma. Ms. Hollins partially contradicts defendants' claims as to Italian talc by stating, "there was a period in 1979 and/or February of 1980 when a 'small amount' of Italian talc was purchased," and goes on to state that according to the documents available for her review talc was sourced from Italy during a strike at defendants usual Vermont mines in 1980 (Hollins Aff. pgs. 9-10, para. 35-36). She also relies in part on studies addressing talc mined in Val Chisone, Italy prior to the period defendants allege is relevant to Mrs. Garrido's alleged use of talc (Hollins Aff., pg. 10, paras. 38-39, pgs. 14 -15, para. 54).

Ms. Hollins relies on animal toxicology studies and concludes that the evidence from animal studies does not support a finding of carcinogenicity of talc, inhaled or otherwise. Ms. Hollins also relies on occupational (commercial/employment based) studies, including those involving Italian cosmetic talc miners and millers, and determines that toxicology and epidemiology literature evaluating the carcinogenic potential of cosmetic talc does not provide "convincing evidence that cosmetic talc results in cases of mesothelioma." (Hollins Aff., pg. 15, para. 55). She prepared two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products for powdering infants (1) over a period of two years and (2) over a 70 year lifetime (Hollins Aff. Table 1 and Table 2, pgs. 17 and 18).

A third table was prepared applying specifically to Mrs. Garrido's potential exposure to JJ talcum powder products, relying on the same data as the other two tables (Hollins Aff., pgs. 22-23, para. 71, Table 3). She calculates that Mrs. Garrido's upper bound cumulative exposure to asbestos from use of JJB talc is "0.006 f/cc-yr." (Hollins Aff., pg. 23, para. 72). In preparing the tables, Mrs. Hollins makes assumptions relying in part on excerpts from Mrs. Garrido's deposition testimony that are not annexed to the motion papers, and "assumed" the time period and amount of exposure where it was lacking in Mrs. Garrido's deposition testimony (Hollins Aff., pg. 22, para. 71, footnotes F, H, I, and K). Ms. Hollins relies on a series of studies that are not annexed to her affidavit or the motion papers to establish that peritoneal mesothelioma has an unknown etiology with only a small number attributed to asbestos exposure (Hollins Aff., pgs. 26-27, paras. 81-83).

Ms. Hollins' affidavit fails to "unequivocally" establish lack of causation or meet defendants' prima facie burden. She contradicts the defendants' arguments and in part relies on evaluations of exposure to Italian talc. There is no scientific basis provided for the second table estimating "Potential Exposure Associated with the Consumer Use of Cosmetic Talcum Powder Products Over a 70-Year Lifetime." Ms. Hollins reliance on studies and unpublished reports that are not annexed to her affidavit, and assumptions made as to Mrs. Garrido's time periods of

exposure indicated in the footnotes as part of the calculations, fails to establish lack of causation. Ms. Hollin's reliance on speculation and conjecture, is not "unequivocal" proof of lack of causation, or establish defendants' prima facie basis to obtain summary judgment (see *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2006], *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, supra, and *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, supra).

Dr. Brent Finley, Ph.D., DABT, has a doctorate in Pharmacology/Toxicology, he is Managing Principal Health Scientist and Executive President of Cardno ChemRisk, a private scientific consulting firm. Dr. Finley is a board certified toxicologist specializing in chemical exposure and human health risk assessment. Dr. Finley did not perform any testing and instead relies exclusively on reports, deposition testimony of Dr. Hopkins, and studies that are not annexed to either his affidavit or the motion papers. Dr. Finley determines that prior historical testing that identified asbestos in talc, is defective. He relies on the Cosmetic Toiletries and Fragrance Association (CTFA) method J4-1 testing that started being implemented in the mid-1970s, and is currently relied on by cosmetic industry, as obtaining the least erroneous results of the asbestos content of cosmetic talc (Finley Aff. pgs. 8-14, paras.17-30).

Dr. Finley prepared a table summarizing the "representative dust and fiber exposure measurement data associated with the consumer application of cosmetic talcum powder." Half the time periods included in the table cover the years 1972 and 2011 which are outside of Mrs. Garrido's alleged exposure period (See Finley Aff., Table 1, page 29). Dr. Finley states that he made assumptions of potential asbestos exposure by relying on the Dement study from 1972, which is prior to Mrs. Garrido's alleged first exposure in 1976, to create Table 2, and determine that Mrs. Garrido was at most exposed to 0.000018 of asbestos from 1984-1985 and 2000-2006 (See Finley Aff., paras. 61-62, Table 2, pgs. 29-30). Dr. Finley further relies on a study by Ablemann et al., 2015 (after the period of Mrs. Garrido's alleged exposure), and further concludes that Mrs. Garrido's lifetime exposure to asbestos is 0.037 f/cc over the course of 40 years (Finley Aff., pg. 31-32, para. 59). He determines that Mrs. Garrido's exposure to asbestos from JJBP is too low to have posed a health risk or caused her peritoneal mesothelioma.

Dr. Finley's affidavit fails to meet defendants' prima facie burden as to causation, under *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, supra and *In re New York City Asbestos Litigation (Mary Juni)*, 148 A.D. 3d 233, supra. The conclusions in Dr. Finley's affidavit are speculative and conclusory. He relies on studies, reports or tests conducted by others and at least half of them were either not annexed to the motion papers, or rely on data that was outside of Mrs. Garrido's alleged period of exposure (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra). Dr. Finley renders a conclusory analysis only taking into account Mrs. Garrido's deposition testimony, and fails to establish lack of causation (*Romano v Stanley*, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 589 [1997] and *Guzman ex. rel. Jones v. 4030 Bronx Blvd. Associates L.L.C.*, 54 A.D. 3d 42, 861 N.Y.S. 2d 298 [1st Dept. 2008]).

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in asbestos and the development of asbestos analytical methods. Dr. Sanchez has been employed by a private entity, the RJ Lee Group, Inc., as a principal investigator for over ten (10) years. He states that talc in its purest form is not asbestos. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials is needed to make a determination. He does not state the frequency of testing needed to make a determination and whether the asbestos containing samples would be identified consistently throughout a given location.

Dr. Sanchez's report attempts to address alleged defects in plaintiffs' expert analysis. He concludes that their finding of asbestos in talc and defendants' talc products is flawed and relies on non-accepted methodology for detection of asbestos. The part of the report that attempts to discredit plaintiffs' experts does not make a prima facie showing of lack of causation (see *Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516; *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575). He ultimately concludes that defendants' talcum powder and the talc used is free of

asbestos to a reasonable degree of scientific certainty. He relies on review, analysis and interpretation of decades of studies conducted by scientists, his own site visits to Italy and China, and testing of allegedly relevant talcs to reach his conclusion.

Dr. Sanchez concludes that the defendants' talc, mined in Italy, Vermont and China, does not contain asbestos. Dr. Sanchez's Affidavit fails to make a prima facie showing of lack of causation as to Mrs. Garrido. He refers to studies and testing with samples that are not from the period relevant to Mrs. Garrido's alleged exposure (ie testing performed by Buzon in 2016 of samples from Guangxi, China, Sanchez aff. pg.15 para. 52), or he fails to show that all of the research was conducted on samples taken from the relevant period. Dr. Sanchez also contradicts defendants' assertions that there is no Italian talc in their products during the period relevant to Mrs. Garrido's alleged exposure. There are reports and studies he cites that are also not annexed to his affidavit or the motion papers (ie his own report dated April 6, 2018), rendering his conclusions speculative (See *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra and *Lopez v. Fordham Univ.*, 69 A.D. 3d 532, 894 N.Y.S.2d 389 [1st Dept., 2010]).

Defendants' experts have not "unequivocally" established that their products could not have contributed to the causation of plaintiff's injury to warrant summary judgment on plaintiffs' negligence and strict liability claims (*Comeau v. W. R. Grace & Co.- Conn. (In re New York City Asbestos Litig.)*, 216 A.D. 2d 79, supra at pg. 80, *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra). Defendants did not meet their prima facie burden with the expert affidavits and the additional reports and studies that are included with the motion papers.

Defendants argument that plaintiffs failed to raise an issue of fact because the opposition papers rely on unsworn expert reports that are hearsay, is unavailing. Defendants did not meet their prima facie burden and there is no need to address the deficiencies in plaintiffs' opposition papers. Alternatively, plaintiffs' unsworn expert reports may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (See *Navararez v. NYRAC*, 290 A.D. 2d 400, 737 N.Y.S. 2d 76 [1st Dept., 2002]). Plaintiff submitted other admissible evidence, including Mrs. Garrido's deposition testimony, in opposing the relief sought (Opp. Exhs. 1, 2 and 3). Plaintiffs rely on their experts' reports, Dr. Longo's deposition testimony in another action, studies and reports. Plaintiffs also e-filed the signed and sworn expert affidavits on October 23, 2018, the day before oral argument, with no objections from the defendants at oral argument (See NYSCEF Docket # 158). Defendants have not shown that they were prejudiced or that the plaintiffs' opposition solely relies on hearsay.

Plaintiffs argue that issues of fact remain as to whether Mrs. Garrido's exposure to asbestos from JJPB caused her mesothelioma. Plaintiffs and their experts include exposure to Italian talc, because of its use in 1980, during a strike at defendants' Vermont mines, and other allegedly limited but relevant periods.

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (*In re New York City Asbestos Litigation (Mary Juni)*, 148 A.D. 3d 233, supra pg. 236, citing to *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]). Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (*Id.*). The *Juni* case applied the *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434 and *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014], standards for the plaintiff to establish causation to asbestos litigation.

Plaintiffs' experts are Dr. Jacqueline Moline, Dr. Steven P. Compton, Dr. William E. Longo and Dr. Murray Finkelstein.

Dr. Jacqueline Moline specializes in occupational and environmental disease specializing

in asbestos related occupational medicine. Defendants arguments that Dr. Moline was discredited in the *Juni* case are unavailing. In the *Juni* case, Dr. Moline testified as to plaintiff's exposure to dust in brakes as part of his employment. In the *Juni* case, the court determined that the plaintiff was unable to establish causation because of Dr. Moline's lack of knowledge whether the asbestos fibers were active after the braking process (In re New York City Asbestos Litigation (Mary Juni), 148 AD3d 233, supra, pg. 237). This case is distinguishable, since it does not involve exposure in a commercial setting or through Mrs. Garrido's work, but as part of the use of cosmetic talc. Dr. Moline relies on studies and reports concluding that even small amounts of exposure are sufficient to cause mesothelioma (Opp. Exh. 42, pg 13). She also relies on studies and reports of asbestos in talc from the same regions and mines in Vermont and China used in defendants' products during the periods relevant to Mrs. Garrido's alleged exposure to asbestos. Dr. Moline concludes that defendants' products were contaminated with asbestos (Opp. Exh. 42, pgs. 15-17). Dr. Moline's opinions are sufficient to raise an issue of fact on the issue of causation.

Dr. Murray Finkelstein is a medical doctor and a doctor of physics, specializing in environmental exposures to toxins including asbestos (Opp. Exh. 53). His affidavit incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of Mrs. Garrido's exposure (Opp. Exh. 54 (Amended)). Dr. Finkelstein's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between Mrs. Garrido's exposure to asbestos - solely through the use of talc in defendants' products for many years - and her mesothelioma.

Dr. Steven Compton is a doctor of physics, with laboratory experience in spectroscopy and microscopy. He is also the executive director of MVA Scientific Consultants a private research facility (Opp. Exh. 19). Dr. Compton prepared a report on Italian Talc dated August 1, 2017 in which he confirmed the presence of asbestos after scanning electron and transmission electron microscopy in thirteen samples of the Italian talc provided to the defendants (Opp. Exh. 20). He concluded that aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers (Opp. Exh. 20). This study is sufficient to raise an issue of fact as to whether asbestos in the Italian talc used by defendants in 1980 could have caused Mrs. Garrido's mesothelioma.

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry (Opp. Exh.49). Plaintiffs provide his deposition testimony in an asbestos case involving other plaintiffs in California, his report dated 8-2-17 and the "Below the Waist App. of JJBP" report dated September of 2017 (Opp. Exhs. 50, 51 and 52 (Amended)). Dr. Longo performed studies on samples of the defendants' products and reviewed other reports and studies - most were annexed to the opposition papers - and concluded that there is asbestos in the talc found in defendants products (Exh. 50 and 51). Dr. Longo's "Below the Waist App. of JJBP" report further quantified the amount of asbestos exposure from the use of talc in a manner similar to Mrs. Garrido's use, determining that over a period of approximately ten (10) years it results in a mean fiber concentration of 2.57 asbestos fibers/cc in the air samples from the breathing area (Opp. Exh. 52 (Amended)). The combined evidence from Dr. Longo raises an issue of fact as to causation. There remains issues of fact as to whether Mrs. Garrido's use of defendant's products exposed her to asbestos and resulted in her mesotheloma.

Defendants' argument that Dr. Longo relies on samples taken before or after Mrs. Garrido's alleged exposure and fails to raise an issue of fact, is unpersuasive, given that Dr. Sanchez and Dr. Finley also relied on at least some studies and samples taken both before and after the relevant period.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011]).

Defendants arguments that the specific bottles of their products used by Mrs. Garrido were not tested and there is no direct evidence of exposure to asbestos, is unpersuasive. Plaintiff is not required to show the precise causes of his damages or quantification, but only show facts and conditions from which defendant's liability may be reasonably inferred. "Summary judgment must be denied when the plaintiff has presented sufficient evidence, not all of which is hearsay, to warrant a trial" (Oken v A.C. & S. (*Matter of New York City Asbestos Litig.*), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs as the non-moving party further warrants denial of summary judgment sought by the defendants on the strict liability and negligence claims.

Plaintiffs have also raised issues of fact as to the punitive damages cause of action. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent plaintiffs argue that the defendants put corporate profits and reputation above the health and safety of the consumer, specifically Mrs. Garrido, by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, there is an issue of fact that should be determined by the jury as to whether this conduct was reckless or wanton such that punitive damages are warranted.

Plaintiffs did not oppose the summary judgment relief sought by defendants on the causes of action for: (4) premises liability, Labor Law and NYS Industrial Code Violations, (5) liability for contractors and subcontractors, (6) liability for "dust mask" defendants, (8) joint and severable liability, and (9) disclaimer of federal jurisdiction (Mot. Kurland Aff. Exh. A). Defendants are entitled to summary judgment on the fourth, fifth, sixth, eighth and ninth causes of action.

Defendants seek summary judgment on the causes of action for both fraud and for breach of express warranty, alleging that plaintiffs failed to establish Mrs. Garrido's reliance on any fraudulent representations or promises about their products. Defendants argue that there is no implied warranty because plaintiffs cannot provide evidence establishing that JBP was contaminated with asbestos or otherwise defective. Alternatively, defendants argue that plaintiffs failed to oppose their arguments and they are entitled to summary judgment dismissing the third cause of action for breach of warranty and the seventh cause of action. Defendants provide excerpts from Mrs. Garrido's deposition testimony to prove that she did not rely on advertising, or have any discussions with their representatives, and establish that she did not rely on fraudulent misrepresentations (Mot. Kurland Aff., Exh. C, pg. 328).

A cause of action asserting fraud requires a showing of: "a misrepresentation or a material omission of fact which was false, and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"(Genger v. Genger, 152 A.D. 3d 444, 55 N.Y.S. 3d 658 [1st Dept., 2017] and Pasternack v. Laboratory Corp. of America Holdings, 27 N.Y. 3d 817, 59 N.E. 3d 485, 37 N.Y.S. 3d 750 [2016]). A party asserting fraud is required to meet the pleading requirements of CPLR §3016[b], requiring particularity and specificity in their claims, mere allegations of fraudulent intent are insufficient (New York City Helath and Hospitals Corporation v. St. Barnabus Community Health Plan, 22 A.D. 3d 391, 802 N.Y.S. 2d 363 [1st Dept. 2005]).

Plaintiffs' cause of action for fraud alleges a material omission of fact resulting from the defendants' suppression and concealment of information about the presence of asbestos in their products (Mot. Kurland Aff., Exh. A). Plaintiffs did not provide specificity in support of their allegation of fraud. They failed to make arguments to raise an issue of fact on their unsupported allegations in the complaint. Plaintiffs' cause of action for fraud is dismissed.

Defendants have established a prima facie basis for summary judgment dismissing the part of plaintiff's third cause of action for breach of express warranty. Plaintiffs did not claim that Mrs. Garrido relied on warranties or statements of fact made by the defendants. Mrs. Garrido did not identify any written warranties or language on the bottles of JJBP that she used, or state any

specific promises made to her by the defendants. Defendants correctly argue that plaintiff has not shown justifiable reliance on any representations (See *Cecere v. Zep Mfg. Co.*, 116 A.D. 3d 901, 983 N.Y.S. 2d 846 [2nd Dept., 2014]). The cause of action for breach of express warranty is dismissed.

Defendants have not established a prima facie basis for summary judgment dismissing plaintiffs' claims for implied warranty. Implied warranty applies to fitness for the purpose of the allegedly defective products used by Mrs. Garrido and that relate to her negligence claims. Plaintiffs have established that issues of fact exist as to whether JJBP used by Mrs. Garrido was contaminated with asbestos and defective, or unsuited for its purpose (See *Denny v. Ford Motor Co.*, 87 N.Y. 2d 248, 662 N.E. 2d 730, 639 N.Y.S. 2d 250 [1995], *Navarez v. Wardsworth*, 2018 N.Y. Slip. Op. 06475 [1st Dept., 2018]).

New York does not generally recognize an independent cause of action for civil conspiracy to commit a tort. Allegations of civil conspiracy are only sustainable to connect the actions of separate defendants with an otherwise actionable tort (See *Blanco v. Polanco*, 116 A.D. 3d 892, 986 N.Y.S. 2d 151 [2nd Dept., 2014] citing to *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y. 2d 968, 503 N.E. 2d 102, 510 N.Y.S. 2d 546 [1986]).

Defendants have stated a prima facies basis to obtain summary judgment on the plaintiffs' seventh cause of action for civil conspiracy and fraud. The plaintiffs' claims of civil conspiracy cannot survive independently after the fraud claims are dismissed on summary judgment.

ACCORDINGLY, it is ORDERED that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint, is granted only to the extent of dismissing the express warranty claim asserted in the third cause of action, the fourth cause of action for premises liability, Labor Law and NYS Industrial Code Violations, the fifth cause of action for liability for contractors and subcontractors, the sixth cause of action for liability for "dust mask" defendants, the seventh cause of action for fraud and civil conspiracy, the eighth cause of action for joint and severable liability, and the ninth cause of action disclaimer of federal jurisdiction, and it is further,

ORDERED that the express warranty claim asserted in the third cause of action, the fourth, fifth, sixth, seventh, eighth and ninth causes of action asserted in the complaint against defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: November 13, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
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