Hardman v Bristol-Myers Squibb Co.
2019 NY Slip Op 32671(U)
September 9, 2019
Supreme Court, New York County
Docket Number: 190443/2018
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

BETSEY P. HARDMAN and JODY E. HARDMAN,

Plaintiff,

- against -

BRISTOL-MYERS SQUIBB CO., *et al*,

Defendants.

INDEX NO. 190443/2018

MOTION DATE 08/21/2019

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on Revlon Inc.'s motion pursuant to CPLR §3024 and CPLR §3211 to strike plaintiffs' complaint alternatively to dismiss Count VIII:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz's (hereinafter "Revlon") motion to dismiss Count VIII of the Complaint, alternatively pursuant to CPLR §3024 to strike plaintiffs' complaint and all cross-claims asserted against it, is granted to the extent that Plaintiffs' Eighth Cause of Action: Fraudulent Misrepresentation and Conspiracy/Concert Action asserted against Revlon, is severed and dismissed. The remainder of the relief sought in this motion is denied.

Plaintiffs are married residents of Texas. Plaintiff Betsey P. Hardman, was diagnosed with mesothelioma in October of 2018 (Mot. Ex. A). Plaintiffs allege that her exposure - as relevant to this motion - was from asbestos in Revlon's Charles of the Ritz and Lavin talcum powder products. On November 26, 2018, plaintiffs commenced this action to recover for injuries sustained from Mrs. Hardman's asbestos exposure. The complaint asserts nine causes of action: for negligence; negligence per se; strict liability - failure to warn; strict liability - manufacturing defect; strict liability - design defect; market share liability; alternative/collective liability for talc suppliers; fraudulent misrepresentation and conspiracy/concert action; and for spousal loss of consortium (Mot. Exh. A).

On December 4, 2018, Revlon was served with the summons and complaint through service the New York Secretary State (NYSCEF Doc. # 8). On December 3, 2018, the case was removed to United States District Court for the Southern District of New York, on the application of co-defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. (Mot. Exh. E). Revlon Inc. filed a motion dated January 14, 2019 in the Federal Court seeking to strike the plaintiffs' complaint under Rule 12(f) of the Federal Rules of Civil Procedure (Mot. Exh. F). On April 17, 2019 pursuant to the Opinion and Order of United States District Judge Andrew L. Carter, Jr., the action was remanded back to New York Supreme Court. Notice of Remand was electronically served on all of the parties on April 18, 2019 (NYSCEF Doc. No. 9). Revlon's federal motion to strike the plaintiffs' complaint was not decided before the case was remanded.

On May 23, 2019 Revlon filed this motion and seeks an Order pursuant to CPLR §3211 to dismiss Count VIII of the Complaint, alternatively pursuant to CPLR §3024 to strike plaintiffs' complaint and all cross-claims asserted against it.

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

At the outset, the relief sought pursuant to CPLR §3024, is untimely. CPLR §3024(c) requires that the motion "be served within twenty days after service of the challenged pleading." (McKinney's Cons. Laws of New York, CPLR §3024). Revlon's motion dated January 14, 2019 in the United States District Court for the Southern District of New York was made more than twenty (20) days after service of the summons and complaint on December 4, 2018, and would have been untimely if made in this Court. Revlon's motion made in the federal jurisdiction did not toll the time period to seek relief pursuant CPLR §3024 in this Court. Additionally,Revlon provides no explanation for waiting over thirty (30) days to seek CPLR §3024 relief, after receiving the notice on April 18, 2019 that this case was remanded to New York Supreme Court.

Alternatively, this Court may, in its discretion, entertain the untimely relief sought pursuant to CPLR §3024(b) to strike prejudicial, scandalous or irrelevant material (McKinney's Cons. Laws of New York, CPLR §3024 - Supplementary Practice Commentaries C:3024:5 citing to Szolosi v. Long Island R. Co., 52 Misc. 2d 1081, 277 NYS 2d 587 [Sup. Ct. Suffolk County, 1967]).

Revlon argues that relief is warranted pursuant to CPLR §3024(b) striking the complaint because the plaintiffs rely on unsupported irrelevant or generic phrases, and inflammatory, prejudicial language that is inadmissible, and prevents the ability to make a proper defense.

CPLR § 3024[b] permits the Court to strike any scandalous or prejudicial matter unnecessarily inserted into a pleading. The relevant inquiry is "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (Soumayah v. Minnelli, 41 AD 3d 390, 839 NYS 2d 79 [1st Dept., 2007]). The assertion of merely "scandalous" or "prejudicial" material is not enough, the movant must also establish that it is irrelevant to the plaintiffs' cause of action and unnecessarily added to the pleading (Rice v. St. Luke's Roosevelt Hosp. Center, 293 AD 2d 258, 739 NYS 2d 384 [1st Dept. 2002] and New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan, 22 AD 3d 391, 802 NYS 2d 363 [1st Dept. 2005]). The best means of determining relevancy of matter inserted into the pleading "is whether it would be admissible in evidence at trial" (Soumayah v. Minnelli, 41 AD 3d 390, supra at 393).

CPLR §3013 requires pleadings to have statements that are, "sufficiently particular to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Small defects are not enough to find a pleading deficient. The sufficiency of a pleading requires that the stated claim is such that it will give Revlon "notice" so that Revlon will be able to state a defense. "A party may supplement or round out his pleading by conclusory allegations or by 'stating legal theories explicitly' if the facts upon which the pleader relies are also stated" (Foley v. D'Agostino, 21 AD 2d 60, 248 NYS 2d 121 [1st Dept. 1964]). Plaintiff is not required to provide proof that actual damages were sustained, only make allegations from which damages attributable to the defendant "might be reasonably inferred" (Risk Control Associates Ins. Group v. Maloof, Lebowitz, Connahan & Oleske, P.C., 127 AD 3d 500, 127 NYS 3d 112 [1st Dept. 2015]).

Revlon has not shown that it is unable to address the alleged generic references in the responsive pleadings, or that the references are irrelevant when viewed in the context of all of plaintiffs' assertions in the cause of action for negligence (Mot. Exh. A, paras. 5 and 23). Revlon's arguments that the use of language in the plaintiff's complaint referring to "asbestos containing," or "asbestos products" is prejudicial or "inflammatory" when compared to "asbestos contamination" is not by itself sufficient to establish prejudice. It is argued that when the generic references are read with phrases in other provisions of the complaint such as "adulterated cosmetic products that were contaminated with asbestos and other carcinogens" it results in Revlon being prejudiced (Mot. Exh. A, at paras. 42 and 58). The references taken out of context from multiple causes of action and are not independently "inflammatory." Revlon has not shown the

references would otherwise taint the outcome of this case or be deemed inadmissible.

Revlon argues that plaintiffs are making inconsistent statements in the complaint. Pursuant to CPLR §3014, plaintiffs can "properly plead alternative arguments, as well as take hypothetical or inconsistent positions" in asserting their claims without the need to strike the complaint (WL Ross & Co. LLC v. Storper, 156 AD 3d 514, 67 NYS 3d 169 [1st Dept. 2017]).

It is argued that the plaintiffs' definition of asbestos found in footnote 2, in paragraph 23, on page 13 of the complaint is prejudicial because there is no evidence to support the last sentence which states "The foregoing nothwithstanding, "asbestos" also includes talc, whether or not known or acknowledged by defendant(s) to contain asbestiform materials."(Mot. Exh. A). Revlon claims that there is no evidence in support of this allegation that will be admissible at trial, but the motion papers provide no evidence to the contrary. Revlon's conclusory assertions that the definition of evidence is unsupported by evidence is not enough to establish it is irrelevant, scandalous or inadmissible at time of trial such that it should be dismissed. To the extent Revlon provides no proof to refute plaintiffs' definition of asbestos, dismissal is premature at this stage of the proceedings.

Revlon cites to paragraphs 100 through 106 as referring to irrelevant and unsupported materials - such as unrelated time periods prior to 1968 that are not at issue in this case, and citing to studies concerning occupational exposures by miners and workers - and argues it should also be stricken. Paragraphs 100 through 106 are incorporated into and part of plaintiffs' "Eighth Cause of Action: Fraudulent Misrepresentation and Conspiracy/Concert Action" (hereinafter "Eighth Cause of Action" asserted against Revlon. This motion pursuant to CPLR §3211, seeks to dismiss plaintiffs' Eighth Cause of Action describing it as "Count VIII." Prior to addressing the CPLR §3024 arguments applying to paragraphs 100 through 106, it is necessary to determine if the entire cause of action should be dismissed.

"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" A motion to dismiss should only be granted if, assuming all allegations are true, the substantive law does not recognize a cause of action (Sokoloff v. Harriman Estates Dev. Corp. 96 NY 2d 409, 729 NYS 2d 425, 754 NE 2d 184 [2001]). "A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim. The facts alleged are given the benefit of every favorable inference (Leon v. Martinez, 84 NY 2d 83, 638 NE 2d 511, 614 NYS 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence, or are inherently lacking in credibility, will not be presumed to be true and are susceptible to dismissal (Simkin v. Blank, 19 NY 3d 46, 968 NE 2d 459, 945 NYS 2d 222 [2012]).

Revlon argues that the allegations in plaintiffs' Eighth Cause of Action for misrepresentation and conspiracy are protected by the *Noerr-Pennington* doctrine and should be dismissed.

The *Noerr-Pennington* doctrine "provides immunity to defendants for their cooperation with the government in the criminal investigation against multiple defendants" for fraud (Shapiro v. Tardalo, 167 AD 3d 555, 89 NYS 3d 77 [1st Dept. 2018]). The *Noerr-Pennington* doctrine has been expanded to apply to protect First Amendment petitioning of the government from claims brought under Federal and State Law. The fact that the effort to influence the government is part of a broader scheme, does not make the conduct illegal and the *Noerr-Pennington*

doctrine has been upheld as applying when the petitioning activity included the use of questionable or underhanded activity. In order to sustain a claim under the Noerr-Pennington doctrine, plaintiffs' complaint must contain allegations specifically "demonstrating that the N*oerr-Pennington* protections do not apply" (Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc., 268 AD 101, 707 NYS 2d 647 [2nd Dept. 2000]).

There are exceptions to the N*oerr-Pennington* protections including the "sham" exception (Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc., 268 A.D. 101, supra at pg. 109). *Noerr-Pennington* immunity, "is not an absolute shield to liability. It will not attach where 'petitioning activity ostensibly directed toward influencing governmental action, is a mere sham to cover...an attempt' to violate federal law." The burden of proving the sham exception applies is on the party that seeks to invoke it (In re Elysium Health-Chromadex Litigation, 354 F Supp. 3d 330 [SDNY, 2019] citing to Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus. ("PRE"), 508 US 49, 113 S Ct 1920, 123 L Ed 611 [1993]).

Plaintiffs' Eight Cause of Action is nineteen (19) pages long with approximately sixty (60) paragraphs, but it fails to specifically identify Revlon. The assertions of fraudulent misrepresentations are too broadly worded, they reference studies from 1936 about occupational diseases and other studies that are unrelated to the alleged influence of the U.S. Food & Drug Adminstration (FDA) (Mot. Exh. A, paras. 104-106 and 117). Plaintiffs argue that Noerr-Pennington protections do not apply and the complaint in this action falls under an exception, but that is not stated in the Plaintiffs' Eighth Cause of Action. Plaintiffs refer to collusion between the "defendants" and Cosmetic, Toiletry & Fragrance Association (CFTA) to make false statements to the public and influence government agencies including the FDA, the National Institute for Occupational Safety and Health (OSHA), the National Institute for Occupational Safety and Health (NIOSH) and the Mine Health Safety Administration (MHS), but then only state details of the alleged influence over the FDA. The mere allegation of government influence to violate the federal law is not enough and plaintiffs' Eight Cause of Action is not specific enough to avoid Noerr-Pennington protections, warranting dismissal.

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]). "[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]). The absence of any "firm factual pleadings" relevant to a specific defendant's knowledge fails to establish a claim (Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 NY 3d 553, 910 N.E. 2d 976, 883 NYS 2d 147 [2009]).

Plaintiffs' Eighth Cause of Action asserts factual allegations on the claim for fraud, generally, as to "all defendants"(Mot. Exh. A, pgs. 27- 46, paras. 97-157). The allegations in Plaintiffs' Eight Cause of Action are conclusory, they do not specifically identify Revlon, nor do they state Revlon's role in the alleged fraudulent conspiracy. Plaintiffs do not meet CPLR §3016(b)'s requisite level of specificity, and thus fail to state a cause of action.

To establish a claim of civil conspiracy, plaintiffs are required to, "...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 the plan or

purpose; and (4) resulting damage or injury."(Abacus Federal Savings Bank v. Lim, 75 A.D. 3d 472, 905 N.Y.S. 2d 585 [1st Dept., 2010]).

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. Blanco, 116 AD 3d 892, 986 NYS 2d 151 [2nd Dept., 2014] citing to Alexander & Alexander of New York, Inc. v. Fritzen, 68 NY 2d 968, 503 NE 2d 102, 510 NYS 2d 546 [1986]). Here, because plaintiffs' underlying fraudulent misrepresentation and concealment claim fails, their claim for Civil Conspiracy also fails. There is no need to address the applying to paragraphs 100 through 106, the entire Eight Cause of Action for "Fraudulent Misrepresentation and Conspiracy/Concert of Action is dismissed.

Accordingly, it is ORDERED, that Defendant Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz's motion pursuant to CPLR §3211 to dismiss Count VIII of the Complaint, alternatively pursuant to CPLR §3024 to strike plaintiffs' complaint and all cross-claims asserted against it, is granted to the extent that Plaintiffs' Eighth Cause of Action: Fraudulent Misrepresentation and Conspiracy/Concert Action asserted against Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz, is severed and dismissed, and it is further,

ORDERED, that Plaintiffs' Eighth Cause of Action: Fraudulent Misrepresentation and Conspiracy/Concert Action asserted against Defendant Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz, is severed and dismissed, and it is further,

ORDERED, that the remaining Causes of Action asserted in Plaintiffs' Complaint against Defendant Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz, remain in effect, and it is further,

ORDERED, that Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz shall serve a copy of this Order with Notice of Entry pursuant to e-filing protocol on plaintiffs as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz, the remaining parties in this action, the County Clerk, and the Trial Support Clerk in the General Clerk's Office who shall mark their records accordingly, and it is further,

ORDERED, that Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz, shall have ten (10) days from entry of this Order to serve and file an answer to the remaining causes of action asserted against it, and it is further,

ORDERED, that the remainder of Revlon Inc. as successor to Charles of the Ritz Inc. and Lanvin-Charles of the Ritz's motion is denied, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

Dated: September 9, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE