

<b>Pellegrino v United States Steel Corp.</b>
2020 NY Slip Op 31217(U)
May 6, 2020
Supreme Court, Kings County
Docket Number: 508063/19
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. PAMELA L. FISHER,  
Justice.

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CATHERINE PELLEGRINO, EXECUTRIX OF THE  
ESTATE OF SALVATORE PELLEGRINO,

Plaintiff,

- against -

Index No. 508063/19

UNITED STATES STEEL CORPORATION,  
RADIATOR SPECIALTY COMPANY,  
BERRYMAN PRODUCTS, INC., UNION OIL  
COMPANY OF CALIFORNIA d/b/a UNOCAL  
AND AMSCO, INDIVIDUALLY AND AS SUCCESSOR  
IN INTEREST TO AMERICAN MINERAL  
SPIRITS COMPANY a/k/a AMSCO,  
THE SAVOGRAN COMPANY, HOUGHTON  
CHEMICAL COMPANY, SAFETY-KLEEN  
SYSTEMS, INC., CRC INDUSTRIES, INC.,  
ADVANCE AUTO PARTS, INC., AMGRO  
INVESTMENTS LIMITED PARTNERSHIP,  
ARCH AUTO PARTS HOLDING COMPANY INC.,  
ARTIES AUTO PARTS, INC., ASHLAND LLC,  
AUTOZONE, INC., BOLSTEIN ENTERPRISES  
LIMITED d/b/a DANDY AUTO SUPPLIES, BP  
PRODUCTS NORTH AMERICA INC., BRENNTAG  
SOUTHWEST, INC. AS SUCCESSOR IN INTEREST TO  
DELTA SOLVENTS & CHEMICALS Co., CASTLE  
PRODUCTS, INC., CHAMPION BRANDS, L.L.C.,  
CHASE PRODUCTS Co., CLING-SURFACE Co., INC.,  
DANDY AUTOMOBILE SUPPLIES,  
FIRST BRANDS CORPORATION, GARDNER  
ASPHALT CORPORATION, GENUINE PARTS  
COMPANY d/b/a NAPA, NATIONAL  
AUTOMOTIVE PARTS ASSOCIATION,  
HENKEL CORPORATION, HUNT OIL COMPANY,  
HUNT REFINING COMPANY, ILLINOIS TOOL

WORKS, INC., d/b/a PERMATEX  
d/b/a GUMOUT AND d/b/a LPS  
LABORATORIES, JOESONS AUTO PARTS  
INC., MOTHERS POLISHES WAXES  
CLEANERS, INC., O'REILLY AUTOMOTIVE,  
INC., PRIME LUBE, INC., REED-UNION  
CORPORATION, RUST-OLEUM CORPORATION,  
SHELL OIL COMPANY, SUNOCO, INC. (R&M)  
f/k/a SUN COMPANY, INC., AND f/k/a SUN  
OIL COMPANY, INC., TECHNICAL CHEMICAL  
COMPANY, THE ARMOR ALL/STP PRODUCTS  
COMPANY, THE CLOROX COMPANY, THE  
B'MASTER CORPORATION, THE PEP BOYS, THE  
SHERWIN-WILLIAMS COMPANY, TRUE  
VALUE COMPANY, L.L.C., UNIVAR USA INC.  
f/k/a CHEMCENTRAL CORP. AND VAN  
WATERS & ROGERS, INC.,

Defendants.

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The following e-filed papers read herein:

NYCEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

115-116 118-119 149-150 209-

210

Opposing Affidavits (Affirmations)\_\_\_\_\_

183-186 177-180 201 218-

221

Reply Affidavits (Affirmations)\_\_\_\_\_

204

Memoranda of Law\_\_\_\_\_

117 182 188 120 176 189 202 211

217

Upon the foregoing papers, in this action by plaintiff Catherine Pellegrino (plaintiff), as the executrix of the estate of Salvatore Pellegrino (Mr. Pellegrino), to recover damages based upon Mr. Pellegrino's exposure to benzene-containing products manufactured and/or sold by numerous defendants, defendant The Sherwin-Williams

Company (Sherwin-Williams) moves, under motion sequence number (mot. seq.) seven, for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing plaintiff's second cause of action for breach of implied warranty, plaintiff's fourth cause of action for fraudulent misrepresentation, and plaintiff's request for punitive damages asserted in her amended complaint as against it. Defendant Amgro Investments Limited Partnership (Amgro) moves, under mot. seq. eight, defendant Advance Stores Company, incorrectly sued herein as Advance Auto Parts Inc. (Advance), along with Berryman Products, Inc., The B'Laster Corporation, Technical Chemical Company, Autozone, Inc., Tru Value Company, United States Steel Corporation, Ashland LLC, Univar USA Inc., Union Oil Company of California, and Gardner Asphalt Corporation, jointly move, under mot. seq. nine, and defendant Reed Union Corporation (Reed Union) moves, under mot. seq. thirteen, for the same relief.

### **Facts and Procedural Background**

Plaintiff alleges that between 1962 and 2018, her husband, Mr. Pellegrino, was employed by various employers in New York, California, and New Jersey, and that during such employment, he was exposed to benzene-containing products. Plaintiff further alleges that during this time period, Mr. Pellegrino also sustained non-occupational exposures to benzene-containing products. Plaintiff asserts that Mr. Pellegrino was exposed on a daily or almost daily basis to these various benzene-containing products, including but not limited to penetrating solvents, other solvents,

adhesives, and degreasers. Plaintiff states that these benzene-containing products and/or their ingredients were manufactured, refined, designed, produced, processed, compounded, converted, packaged, sold, distributed, marketed, re-labeled, supplied, and/or otherwise placed into the stream of commerce by defendants.

On December 10, 2016, Mr. Pellegrino, was diagnosed with Myelodysplastic Syndrome (MDS), which is a potentially fatal form of blood cancer. On April 16, 2018, Mr. Pellegrino died from MDS. Plaintiff asserts that defendants' benzene-containing products are what caused Mr. Pellegrino to contract and die from MDS.

On April 10, 2019, plaintiff filed the instant action against several of the defendants. On August 16, 2019, plaintiff amended her complaint, adding more defendants. Plaintiff's amended complaint contains a first cause of action for negligence/gross negligence, a second cause of action for breach of implied warranty, a third cause of action for strict products liability, a fourth cause of action for fraudulent misrepresentation, a fifth cause of action for wrongful death, and a sixth cause of action for survival damages pursuant to EPTL 11-3.1 et seq.

Sherwin-Williams and Amgro have not yet interposed answers. Advance and the other defendants named in their notice of motion (the joint defendants), as well as Reed, have interposed answers, but have asserted the affirmative defense of the statute of limitations in their answers, thereby preserving this defense. In addition, it is noted that a defendant may move for dismissal of a complaint based upon the ground of CPLR 3211 (a) (7) even after service of an answer (*see* CPLR 3211 [e]).

On September 4, 2019, Sherwin-Williams and Amgro filed their instant motions to dismiss. On September 23, 2019, Advance and the joint defendants filed their joint motion to dismiss. On January 21, 2020, Reed filed its instant motion to dismiss. Plaintiff opposes the motions of all of these defendants (the moving defendants).

### Discussion

#### **Standard for Dismissal**

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction” (*High Tides, LLC v DeMichele*, 88 AD3d 954, 956-957 [2d Dept 2011]; *see also* CPLR 3026; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[T]he court must accord the plaintiff ‘the benefit of every possible favorable inference,’ accept the facts alleged in the complaint as true, and ‘determine only whether the facts as alleged fit within any cognizable legal theory’” (*High Tides, LLC*, 88 AD3d at 956-957, quoting *Leon*, 84 NY2d at 87-88; *see also* *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Morone v Morone*, 50 NY2d 481, 484 [1980]). “Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action” (*High Tides, LLC*, 88 AD3d at 956-957; *see also* *Kuzmin v*

*Nevsky*, 74 AD3d 896, 898 [2d Dept 2010]; *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006]).

### **Plaintiff's Second Cause of Action for Breach of Implied Warranty**

The moving defendants contend that plaintiff's second cause of action for breach of implied warranty fails to state a viable claim. Pursuant to Uniform Commercial Code (UCC) 2-314 (2) (c), there is an implied warranty that goods are merchantable. UCC 2-314 (2) (c) provides that in order for goods to be merchantable, they must at least be "fit for the ordinary purposes for which such goods are used." Recovery under a claim for breach of implied warranty, pursuant to UCC 2-314 (2) (c), "may be had upon a showing that the product was not minimally safe for its expected purpose--without regard to the feasibility of alternative designs or the manufacturer's 'reasonableness' in marketing it in that unsafe condition" (*Denny v Ford Motor Co.*, 87 NY2d 248, 259 [1995]). UCC 2-318 provides that a seller's implied warranty "extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

The moving defendants assert that plaintiff has not alleged that the benzene-containing products were not fit for their ordinary purposes. They rely upon *Ferracane v United States* (No. 02-CV-1037 [SLT], 61 UCC Rep Serv 2d 1045, 2007 WL 316570, \*8 [ED NY Jan. 30, 2007], quoting *Denny*, 87 NY2d at 258, n 4), which stated that "[t]he warranty of fitness for ordinary purposes is not a guarantee that the product will be

perfectly safe or ‘fulfill [a] buyer’s every expectation,’” but, rather, “such a warranty provides for a minimal level of quality.” The moving defendants state that for example, with respect to paint products placed in the stream of commerce by them, plaintiff has not shown that they were not fit for their ordinary use, which is to paint surfaces. They contend that paint does not have to be perfectly safe, but is only required to have a minimal level of quality with regard to its use as paint. They state that this same analysis applies to the other benzene-containing products, namely, that the products need not be perfectly safe, but merely need to have a minimal level of quality with respect to their ordinary use and purpose.

The moving defendants’ reliance upon *Ferracane* is misplaced. *Ferracane*, while noting that products need not be perfectly safe, expressly held that an implied warranty under UCC 2-314 (2) (c) requires that the product be “minimally safe for its expected purpose” (*id.*).

In *Ferracane*, the plaintiff truck driver therein sued the manufacturer of landing gear of a semitrailer to recover for injuries he allegedly sustained when the handle of a crank he was using to lower the landing gear “snapped back” and struck him in the head (*id.* at \*1). The federal district court, in *Ferracane*, granted a motion by the manufacturer for summary judgment dismissing the plaintiff’s claim since the plaintiff truck driver failed to present any evidence that the landing gear was “not minimally safe for its expected purpose,” and it was found that “although the landing gear may not have been perfect, the alleged defect rarely evidenced itself and did not substantially detract from

the overall quality of the product” (*id.* at \*9). Here, in contrast, plaintiff has adequately alleged that the benzene-containing products were not minimally safe for their expected purpose since they caused MDS. Moreover, unlike in *Ferracane*, this is a motion to dismiss, as opposed to a motion for summary judgment, and this allegation is, therefore, accepted as true for purposes of this motion (*see Leon*, 84 NY2d at 87-88).

Plaintiff, in paragraph 76 of her amended complaint, alleges that defendants impliedly warranted, including under the UCC, to Mr. Pellegrino that “the benzene-containing products were merchantable, reasonably fit and safe for their ordinary and/or intended, stated and described purpose and application, when in fact they were not.” Plaintiff further alleges, in paragraph 77 of her amended complaint, that defendants breached those warranties to Mr. Pellegrino in that their benzene-containing products “were inherently defective, ultra-hazardous, dangerous, deleterious, poisonous, carcinogenic, unfit for their ordinary use, not properly merchantable and not safe as marketed, for their foreseeable use and purpose” since “they contained benzene and caused lymphohematopoietic diseases, including MDS, were defectively designed and lacked [or did not contain adequate] warnings, instructions and training.” Plaintiff also alleges, in paragraph 79 of her amended complaint, that as a direct and proximate result, Mr. Pellegrino contracted MDS.

Plaintiff’s allegations are sufficient to allege a viable claim for breach of implied warranty. Such allegations adequately allege that the moving defendants’ products, due to their benzene content and propensity to cause cancer, namely, Mr. Pellegrino’s MDS,

were not safe for their intended, ordinary, and stated purpose and use. It is well established that “where an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned,” both the manufacturer and the seller may be held liable “for breach of . . . implied warranties, to the persons whose use is contemplated” (*Goldberg v Kollsman Instrument Corp.*, 12 NY2d 432, 436-437 [1963]). Here, the moving defendants’ products, due to their benzene content, posed a danger to end-users, including Mr. Pellegrino, who developed and then died from MDS.

Significantly, Justice Arlene P. Bluth of the Supreme Court, New York County, in *Smith v Ashland, Inc.* (2018 NY Slip Op 32448[U], \*6 [Sup Ct, NY County 2018]), recently addressed and rejected very similar arguments as those made by the moving defendants in an action by a different plaintiff, who was represented by the same counsel who currently represents plaintiff. In *Smith*, the plaintiff therein alleged that her late husband, Mark Smith (Mr. Smith), developed MDS and died as a result of exposure to benzene-containing products while working as a mechanic (*id.* at \*2). The complaint in *Smith* was, in pertinent part, identical to plaintiff’s amended complaint herein.

In *Smith*, the defendants therein similarly contended that the plaintiff could not state a cause of action for breach of implied warranty “because the products were fit for their ordinary purpose” (*id.* at \*6). The defendants therein pointed out that “some of the products, such as gasoline, [were] commonly used for cars and machines” (*id.*). They

also argued that “the products need not be perfectly safe--they simply need to have a minimal level of quality with respect to their intended use” (*id.*).

Justice Bluth rejected those arguments and held that the plaintiff had stated a valid cause of action for breach of implied warranty (*id.*). She noted that the third amended complaint alleged that “the products were not fit because they were not safe and that defendants failed to train, warn, or develop alternative products that did not contain benzene” (*id.*). She further noted that the plaintiff had alleged that “the ordinary and foreseeable use of these products was intrinsically dangerous” (*id.*). Justice Bluth ruled that “[t]he fact is that the products could not be fit for their ordinary purpose if plaintiff proves, as alleged in the [t]hird [a]mended [c]omplaint, that these products were extremely dangerous and unsafe” (*id.*).

The court notes that there were also two cases, which are very similar to the case at bar, decided by Justice Gregory R. Gilbert, namely *Cole v Safety-Kleen Systems, Inc.* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 002841/18) and *Arpino v Ashland, LLC* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 007335/18). *Cole* was a products liability action, in which the plaintiff therein, Mark Cole, alleged that he developed cancer due to benzene contained in cleaning solvents and other benzene-containing products used by him during his employment as an auto mechanic. Similarly, *Arpino* was a products liability action, in which the plaintiff therein alleged that her decedent, John Arpino, died from cancer due to benzene contained in

cleaning solvents and other benzene-containing products used by him during his employment as an auto mechanic.

In both *Cole* and *Arpino*, Justice Gilbert rejected the argument that the plaintiff “failed to allege the necessary element that the products at issue were not fit for their ordinary purpose.” Justice Gilbert quoted from and relied upon the *Smith* case. In each case, Justice Gilbert ruled that the complaint adequately set forth a cause of action for breach of implied warranty. He noted that the plaintiff would need to prove that the products were unsafe as manufactured and marketed to ultimately recover on this cause of action, but that such proof was not necessary to defeat the defendants’ motion to dismiss.

The court here similarly rejects the arguments of the moving defendants. Plaintiff’s breach of implied warranty claim should not be dismissed as plaintiff alleges that the moving defendants’ products were not safe for their ordinary purpose and that the moving defendants failed to warn that they were unsafe for their ordinary purpose. The court finds that plaintiff has adequately alleged a valid cause of action for breach of implied warranty. Thus, the moving defendants’ motions, insofar as they seek dismissal of plaintiff’s second cause of action for breach of warranty pursuant to CPLR 3211 (a) (7), must be denied.

The moving defendants alternatively contend that plaintiff’s second cause of action for breach of implied warranty should be modified to comply with the applicable statute of limitations. A claim for breach of implied warranty is subject to a four-year

statute of limitations (*see* UCC 2-725 [1]; *Weiss v Polymer Plastics Corp.*, 21 AD3d 1095, 1097-1098 [2d Dept 2005]; *Ito v Dryvit Sys., Inc.*, 16 AD3d 554, 555 [2d Dept 2005], *lv denied* 6 NY3d 705 [2006]). A breach of implied warranty claim based upon personal injury against a supplier of a toxic product is not subject to CPLR 214-c (*see Doyle v American Home Prods. Corp.*, 286 AD2d 412, 413-414 [2d Dept 2001]). Rather, pursuant to UCC 2-725 (2), a cause of action for breach of implied warranty “accrues when the breach occurs and, in the absence of a warranty explicitly extending to future performance, a breach occurs when tender of delivery is made” (*Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 407 [1985]).

Here, plaintiff alleges a breach of implied warranty claim dating back decades to 1962. Plaintiff does not dispute that the four-year statute of limitations applies to her breach of implied warranty claim and that it accrues when tender of delivery is made. Plaintiff solely argues that her breach of implied warranty claim should not be partially dismissed until she is afforded an opportunity for discovery. However, there is no possibility that discovery could lead to any relevant evidence which could negate the fact that plaintiff’s breach of implied warranty claim is time-barred to the extent that it accrued four years prior to the commencement of this action.

There is no dispute that plaintiff’s breach of implied warranty claim, insofar as it alleges that Mr. Pellegrino was exposed to the moving defendants’ benzene-containing products within four years of the commencement of this action, were timely. As plaintiff acknowledges, the determination of whether Mr. Pellegrino was exposed to products of

each of the moving defendants within four years of the filing of this action must await discovery.

Plaintiff's claim for breach of implied warranty, however, is partially time-barred to the extent that it is based on the use of benzene-containing products delivered over four years prior to the date that plaintiff asserted this claim on April 10, 2019, when plaintiff filed her summons and complaint. This bars plaintiff's breach of implied warranty claim for benzene-containing products delivered prior to April 10, 2015 with respect to both Mr. Pellegrino's occupational and non-occupational uses. Plaintiff's breach of implied warranty claim must be limited to products delivered within four years from April 10, 2019, the date that this action was commenced. Thus, plaintiff's second cause of action for breach of implied warranty, solely to the extent that it alleges that Mr. Pellegrino was exposed to benzene-containing products prior to April 10, 2015, must be dismissed as time-barred (*see* CPLR 3211 [a] [5]).

#### **Plaintiff's Fourth Cause of Action for Fraudulent Misrepresentation**

The moving defendants, in support of their motions, assert that plaintiff's fourth cause of action fails to state a viable claim for fraudulent misrepresentation. They assert that a claim of fraudulent misrepresentation is seldom used as a basis for recovery in a products liability case. They note that the focus of a products liability case is on whether a product defect exists whereas the focus of a claim for fraudulent misrepresentation is the plaintiff's reliance upon a defendant's misrepresentation or concealment.

In order to state a claim for fraudulent misrepresentation, a plaintiff must allege “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” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; see also *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]; *Bernardi v Spyratos*, 79 AD3d 684, 687 [2d Dept 2010]). CPLR 3016 (b) sets forth that where a cause of action is based upon fraudulent misrepresentation, “the circumstances constituting the wrong shall be stated in detail. CPLR 3016 (b) “requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977], *rearg denied* 44 NY2d 733 [1978]).

The moving defendants contend that here, the element of material reliance is absent. They claim that plaintiff has not sufficiently pleaded the reliance element in detail because she devotes only one paragraph to this element, namely paragraph 267 of her amended complaint, in which she asserts that Mr. Pellegrino “relied upon the fraudulent misrepresentations, misrepresentations and omissions made by the [d]efendants.” The moving defendants contend that this is a bare conclusory allegation which lacks particularity, and is insufficient as a matter of law to allege the required element of reliance.

This single paragraph, however, cannot be viewed in isolation. Rather, it must be considered along with the other allegations of plaintiff's amended complaint. Plaintiff alleges, in her amended complaint, that during the time period when Mr. Pellegrino was exposed to their products, defendants were aware that benzene causes cancer, and despite their knowledge that there was benzene in their products and that benzene causes cancer, they withheld this knowledge and did not warn or otherwise disclose this information to the general public or the end-users of their benzene-containing products. Plaintiff further alleges that defendants "acted to manipulate public information and knowledge in order to give the impression that benzene and benzene-containing products were safe," and acted to "prevent the disclosure of information [that was] available to [them] regarding the true and full nature of the health hazards of benzene and benzene-containing products."

Plaintiff asserts that defendants consciously and actively concealed and suppressed their knowledge that their benzene-containing products caused cancer from members of the general public, thereby impliedly representing to them that their benzene-containing products were safe for all reasonably foreseeable uses, with the knowledge of the falsity of such implied representation and with the knowledge, intent, and reasonable expectation that the users of their benzene-containing products would rely upon this representation. Plaintiff alleges that Mr. Pellegrino relied upon the fraudulent representations, misrepresentations, and omissions made by defendants. Specifically, plaintiff alleges that Mr. Pellegrino and his employers relied on the moving defendants to

warn consumers about any known health risks associated with their products and on their implied representation that their benzene-containing products were safe for all reasonably foreseeable uses. Thus, plaintiff explicitly alleges that Mr. Pellegrino used defendants' benzene-containing products in reliance upon defendants' silence about their products' substantial health hazards. Plaintiff alleges that Mr. Pellegrino so relied to his detriment, causing him harmful benzene exposure, injury, MDS, and death.

While plaintiff does not specifically allege how each defendant knew that benzene caused cancer, "courts have recognized that, in certain circumstances, it may be "almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]). "Under such circumstances, the heightened pleading requirements of CPLR 3016 (b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the [fraud]" (*High Tides, LLC*, 88 AD3d at 957, quoting *Pludeman*, 10 NY3d at 492; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]; *Goel v Ramachandran*, 111 AD3d 783, 792-793 [2d Dept 2013]).

The material factual allegations in plaintiff's amended complaint, in light of the surrounding circumstances described therein, give rise to a reasonable inference that the

moving defendants had actual knowledge that benzene caused cancer and the falsity of their implied representations, upon which Mr. Pellegrino allegedly relied, that their benzene-containing products were safe (*see Pludeman*, 10 NY3d at 491-492; *Polonetsky*, 97 NY2d at 55; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 444-445 [1st Dept 2010]). Thus, the heightened pleading requirement of CPLR 3016 (b) is met. Plaintiff has adequately alleged the requisite element of reliance necessary to state a claim of fraudulent misrepresentation.

Justice Bluth, in *Smith* (2018 NY Slip Op 32448[U], \*4), addressed similar arguments by the defendants therein as those presently raised by the moving defendants with respect to the plaintiff's fraudulent misrepresentation cause of action. Justice Bluth observed that the plaintiff had alleged that "defendants knew benzene was harmful and that they prevented disclosure of information that would reveal the harmful effects of benzene," and further alleged how the individual defendants "purportedly obtained information about the harmful effects of benzene" (*id.*). Justice Bluth also observed that the plaintiff contended that Mr. Smith "and others around him relied upon the fraudulent representations, misrepresentations and omissions made by the [d]efendants and did so to the [p]laintiff's [d]ecedent's detriment causing harmful benzene exposure and injury" (*id.*).

Similar to the moving defendants' argument here, the defendants in *Smith* argued that there was only one paragraph which had an allegation about reliance and it was not enough to state a cause of action (*id.*). Justice Bluth rejected this argument, finding that

this single paragraph should not be viewed in isolation, but should be considered along with the allegations in the complaint that the moving defendants “actively sought to conceal the harmful effects of benzene, that Mr. Smith used products containing benzene and that he eventually contracted MDS because he used those products” (*id.*). Justice Bluth held that “[t]he reliance element is clear--Mr. Smith used products with the expectation that the [m]oving [d]efendants would not hide crucial information about potential safety hazard” (*id.*). Justice Bluth noted that the purpose of CPLR 3016 (b) “of requiring plaintiffs to plead fraud with particularity is to put defendants on notice of ‘the circumstances constituting the wrong,’” and that the plaintiff had done that there (*id.* at 4-5). Justice Bluth, therefore, denied defendants’ motion to dismiss the cause of action for fraudulent misrepresentation, holding that the plaintiff therein stated a valid cause of action for fraudulent misrepresentation (*id.*).

In *Cole* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 002841/18), Justice Gilbert similarly noted that the defendants therein took the position that the complaint failed to allege the necessary element of justifiable reliance by claiming that it only alleged this in conclusory terms in one paragraph of the complaint. He observed, however, that other paragraphs of the complaint detailed the alleged fraudulent misrepresentations and omissions of the defendants and alleged that members of the public, including the plaintiff, “had no knowledge of the effects of exposure to benzene products based on these misrepresentations.” He found that the paragraph which

alleged the plaintiff's reliance on the misrepresentations and omissions were "more properly read with reference to . . . these allegations."

Justice Gilbert then cited and reached the same conclusion as reached by Justice Bluth in *Smith*. He ruled that the reasonable inference from these allegations were that the plaintiff "relied to his detriment on the concealed and omitted information by continuing to use the products in the belief that they were safe to use." He ruled that the plaintiff had stated a valid cause of action for fraudulent misrepresentation and denied the motions to dismiss this cause of action.

Justice Gilbert, in *Arpino* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 007335/18), applied the identical analysis with respect to the fraudulent misrepresentation cause of action of the plaintiff therein. He found that the plaintiff had stated a valid cause of action for fraudulent misrepresentation and denied dismissal of that claim.

As in *Smith*, *Cole*, and *Arpino*, the court finds that plaintiff's fourth cause of action states a valid claim for fraudulent misrepresentation. Consequently, the moving defendants' motions, insofar as they seek dismissal of this claim, pursuant to CPLR 3211 (a) (7), must be denied.

#### **Plaintiff's Claim for Punitive Damages**

The moving defendants contend that the conduct alleged by plaintiff is insufficient to permit the recovery of punitive damages, and that plaintiff's claim for punitive

damages in the amended complaint must be dismissed. It is well established, however, that an award of punitive damages may be assessed where the defendants' conduct evinced "a high degree of moral culpability" which "manifest[ed] a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard'" (*Home Ins. Co. v Am. Home Products Corp.*, 75 NY2d 196, 203 [1990], quoting *Welch v Mr. Christmas*, 57 NY2d 143, 150 [1982]; see also *Walker v Sheldon*, 10 NY2d 401, 404 [1961]; *Greenberg v Meyreles*, 155 AD3d 1001, 1003 [2d Dept 2017]; *Sieger v Zak*, 74 AD3d 1319, 1319-1320 [2d Dept 2010]). "Such conduct need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness" (*Home Ins. Co.*, 75 NY2d at 204; see also *Giblin v Murphy*, 73 NY2d 769, 772 [1988]). Punitive damages may be recovered in products liability actions (see *Home Ins. Co.*, 75 NY2d at 204).

Here, plaintiff alleges that the moving defendants acted with a conscious and deliberate disregard for the rights of others in selling their benzene-containing products despite their knowledge that they contained benzene and presented a cancer hazard. Plaintiff's claims for gross negligence and fraudulent misrepresentation support an award of punitive damages.

Plaintiff, in her amended complaint, has pleaded that the moving defendants' reckless and conscious disregard for the rights of Mr. Pellegrino and other end-users of their benzene-containing products rose to the level of gross negligence, and that there were fraudulent misrepresentations by the moving defendants. Plaintiff alleges that the

moving defendants knowingly concealed from the public that their benzene-containing products were highly toxic and extremely dangerous with the knowledge that end-users like Mr. Pellegrino would rely upon the moving defendants' implied representation that such products were safe for use, to Mr. Pellegrino's detriment, who developed MDS and died.

Plaintiff alleges, at paragraph 70 of her amended complaint, that the "manufacture and sale of products with benzene in them and without any or adequate warning resulted from decisions that placed the [d]efendants' profits over the rights and safety of [Mr. Pellegrino] and others similarly situated." Plaintiff further alleges, at paragraph 262 of her amended complaint, that despite defendants' knowledge that their products would expose Mr. Pellegrino and others similarly situated to benzene, which would place them at an increased risk of contracting cancer and dying, they "acted in conscious disregard of the rights, safety, and health of those working with and around their products, including [Mr. Pellegrino]." Plaintiff also alleges, at paragraph 263 of her amended complaint, that defendants' conduct was "willful, wanton, knowing, purposeful and intentional," and was "of such [a] degree and magnitude that [it] rose to the level of conduct exhibiting reckless indifference to the health, safety, rights and welfare of [Mr. Pellegrino]."

It is noted that in *Smith* (2018 NY Slip Op 32448[U], \*7), Justice Bluth, in reviewing nearly identical allegations, pointed to the plaintiff's assertions that "both the gross negligence and fraudulent misrepresentation causes of action support[ed] a claim

for punitive damages.” Justice Bluth denied dismissal of plaintiff’s claim for punitive damages (*id.*).

Similarly, Justice Gilbert, in *Cole* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 002841/18), ruled that a claim for punitive damages was stated by the complaint “based on allegations of wilful, malicious and outrageous conduct in conscious disregard and with indifference to the safety of users.” He noted that the allegations supported an initial claim for punitive damages and that the plaintiff should be permitted disclosure on this subject.

Justice Gilbert, in *Arpino* (Sup Ct, Onondaga County, Jan. 17, 2019, Gilbert, J., index No. 007335/18), also denied dismissal of the punitive damages claim of the plaintiff therein. He held that the plaintiff had pleaded that the defendants “possessed a conscious and deliberate disregard of the interests of others,” and that “this create[d] a reasonable inference that the conduct may be called willful or wanton to a degree sufficient to support a claim of punitive damages.”

The court finds that in the case at bar, the allegations in plaintiff’s amended complaint, construed liberally, provide sufficient factual support for plaintiff’s claim for punitive damages so as to withstand the moving defendants’ motions to dismiss at this stage of the action (*see Archer-Vail v LHV Precast Inc.*, 168 AD3d 1257, 1259 [3d Dept 2019]). Consequently, dismissal of plaintiff’s claim for punitive damages must be denied.

### Conclusion

Accordingly, the moving defendants' motions are granted to the extent that plaintiff's second cause of action for breach of implied warranty with respect to their benzene-containing products delivered prior to April 10, 2015 is dismissed pursuant to CPLR 3211 (a) (5). The moving defendants' motions are denied insofar as they seek dismissal, pursuant to CPLR 3211 (a) (7), of: (1) plaintiff's second cause of action for breach of implied warranty with respect to their benzene-containing products delivered on or after April 10, 2015; (2) plaintiff's fourth cause of action for fraudulent misrepresentation; and (3) plaintiff's claim for punitive damages.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

