

Lotrean v 3M Co.

2021 NY Slip Op 31143(U)

April 8, 2021

Supreme Court, New York County

Docket Number: 153361/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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MARINEL LOTREAN and MARIE LOTREAN,

Plaintiffs,

- v -

3M COMPANY F/K/A MINNESOTA MINING AND MANUFACTURING, ALBERT KEMPERLE, INC., ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC, CHEVRON PHILLIPS CHEMICAL COMPANY LP, E.I. DU PONT DE NEMOURS AND COMPANY, EXXON MOBIL CORPORATION, H. EDELSTEIN AUTOMOTIVE SUPPLY INC, PPG INDUSTRIES, INC, RUST-OLEUM CORPORATION SUED INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO RUST-OLEUM CORPORATION, SAFETY-KLEEN SYSTEMS, INC, SHELL OIL COMPANY, ZEP INC., SUED INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ACUITY SPECIALTY PRODUCTS, A DIVISION OF ACUITY BRANDS, INC., SUCCESSOR-IN-INTEREST TO LIGHTING EQUIPMENT AND CHEMICAL DIVISIONS OF NATIONAL SERVICES INDUSTRIES, INC., D/B/A ZEP MANUFACTURING

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 32, 33, 40, 41, 42, 43, 45, 46, 51, 52, 53, 54, 59, 60, 61, 64, 65, 66, 67, 68, 80, 81, 82, 83, 84, 87, 89, 91, 92, 94, 95, 98, 99, 100, 101, 102, 103

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 62, 63, 69, 75, 88, 90, 104, 105

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 70, 86, 106

were read on this motion to/for DISMISS

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 85, 93, 107

were read on this motion to/for DISMISS.

The motions are decided in accordance with the attached Decision and Order.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>4/8/2021</u>							
DATE							
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED			<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
SEQ 001	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
SEQ 002	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
SEQ 003	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
SEQ 005	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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							REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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MARINEL LOTREAN and MARIE LOTREAN,

Plaintiffs,

- v -

3M COMPANY F/K/A MINNESOTA MINING AND
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ATLANTIC RICHFIELD COMPANY, CHEVRON
U.S.A. INC, CHEVRON PHILLIPS CHEMICAL
COMPANY LP, E.I. DU PONT DE NEMOURS AND
COMPANY, EXXON MOBIL CORPORATION, H.
EDELSTEIN AUTOMOTIVE SUPPLY INC, PPG
INDUSTRIES, INC., RUST-OLEUM CORPORATION,
SUED INDIVIDUALLY AND AS SUCCESSOR-IN-
INTEREST TO RUST-OLEUM CORPORATION,
SAFETY-KLEEN SYSTEMS, INC, SHELL OIL
COMPANY, ZEP INC., SUED INDIVIDUALLY AND
AS SUCCESSOR-IN-INTEREST TO ACUITY
SPECIALTY PRODUCTS, A DIVISION OF ACUITY
BRANDS, INC., SUCCESSOR-IN-INTEREST TO
LIGHTING EQUIPMENT AND CHEMICAL
DIVISIONS OF NATIONAL SERVICES INDUSTRIES,
INC., D/B/A ZEP MANUFACTURING

Defendants.

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HON. NANCY M. BANNON:

I. INTRODUCTION

In this products liability action, the plaintiffs seek to recover damages for injuries the plaintiff Marinel Lotrean alleges he suffered as a result of his exposure to products containing the chemical compound known as benzene between 1979 and 1992. The plaintiffs state claims against the defendants sounding in negligence/gross negligence (first cause of action), breach of warranty (second cause of action), strict products liability (third cause of action), and loss of

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**DECISION + ORDER ON
MOTION**

consortium (fourth cause of action). The plaintiffs also seek punitive damages against the defendants.

Defendants Exxon Mobil Corporation (“Exxon”) and PPG Industries, Inc. (“PPG”), now move pursuant to CPLR 3211(a)(5) and (7) to dismiss the plaintiffs’ second cause of action sounding in breach of warranty and the plaintiffs’ request for punitive damages (SEQ 001). They are joined in their application by means of cross motions by defendants Atlantic Richfield Company (“ARCO”), Albert Kemperle, Inc. (“Kemperle”), Chevron U.S.A., Inc. (“Chevron”), Chevron Phillips Chemical Company, LP (“Chevron Phillips”), Rust-Oleum Corporation (“Rust-Oleum”), and Zep, Inc. (“Zep”). Defendants Safety-Kleen Systems, Inc. (“Safety-Kleen”), (SEQ 002) and Shell Oil Company (“Shell”) (SEQ 003) likewise move under separate motion sequences pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss the plaintiffs’ second cause of action and request for punitive damages. Defendant 3M Company (“3M”) joins in Safety-Kleen’s application by means of a cross motion. Finally, E.I. du Pont de Nemours and Company (“DuPont”) moves pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) for the same relief as the foregoing defendants (SEQ 005).

The plaintiffs oppose only the branch of each of the motions and cross-motions seeking dismissal of their request for punitive damages. The court heard oral argument on the motions. For the following reasons, the defendants’ motions and cross-motions are granted in part.

II. BACKGROUND

The complaint alleges that the plaintiff Marinel Lotrean (“Marinel”) was employed by Camera Autobody from approximately 1979 through 1983 and 1985 through 1992. In the course of his employment, and “in certain non-occupational activities,” the plaintiffs state that Marinel

was exposed to, “on a daily or almost daily basis, various benzene-containing auto body products, including but not limited to, penetrating solvents, solvents, degreasers, rust penetrants, primers, paints, and enamels.” The defendants purportedly “manufactured, refined, designed, produced, processed, compounded, converted, packaged, sold, distributed, marketed, re-labeled, supplied and/or otherwise placed into the stream of commerce” the benzene-containing products and/or ingredients.

According to the complaint, as a result of Marinel’s exposure to benzene-containing products and ingredients, he contracted Myelodysplastic Syndrome (“MDS”), a bone marrow failure disorder, with which he was diagnosed on or about May 10, 2017. The plaintiffs aver, *inter alia*, that the defendants failed to adequately warn Marinel and his employers that the products and/or ingredients they produced contained benzene, that exposure to benzene-containing products such as theirs could result in serious dangers to human health such as cancer, leukemia, and other blood and bone marrow diseases, and that reasonable safeguards were necessary and available to protect users from those serious risks. Further, the plaintiffs allege that the defendants were well-aware of the foregoing but declined to take any appropriate action to safeguard users of their products and even packaged the products in a manner that increased users’ exposure to benzene, choosing corporate profit over the users’ safety.

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD 2d 383, 383 (1st

Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD 3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD 3d 78 (2nd Dept. 2010).

Although DuPont moves to dismiss parts of the complaint pursuant to CPLR 3211(a)(1), it makes no arguments in its motion papers as to that subsection and the court cannot discern any basis for dismissal on such a ground from the papers submitted on DuPont's motion.

B. CPLR 3211(a)(5)

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired.” Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD 3d 815, 816 (2nd Dept. 2008); see Gravel v Cicola, 297 AD 2d 620 (2nd Dept. 2002). “The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant.” QK Healthcare, Inc. v InSource, Inc., 108 AD 3d 56 (2nd Dept. 2013).

C. CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v

Martinez, 84 NY2d 83 (1994). “The motion must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

IV. DISCUSSION

A. Breach of Warranty Claim

In New York, breach of warranty claims are subject to a four-year statute of limitations. N.Y. U.C.C. § 2-725(1), (2); see Vanata v Delta Intl. Mach. Corp., 269 AD 2d 175 (1st Dept. 2000). The statute of limitations on a breach of warranty claim begins to run at the time a product is placed into the stream of commerce or at the time of sale by the manufacturer. See Vanata v Delta Intl. Mach. Corp., supra; Schrader v Sunnyside Corp., 297 AD 2d 369 (2nd Dept. 2002).

According to the complaint, Marinel’s exposure to benzene-containing products and ingredients occurred in 1992 at the very latest. Thus, the offending products must have been placed into the stream of commerce or sold at or before that time. However, the plaintiffs did not commence this action until May 26, 2020, nearly three decades later. The plaintiffs concede that there is no “discovery” exception applicable to breach of warranty claims that would extend the limitations period in light of Marinel’s recent MDS diagnosis. Accordingly, the plaintiffs’ second cause of action sounding in breach of warranty must be dismissed as time-barred. The court need not reach the alternative argument, advanced by some of the moving defendants, that the plaintiffs’ breach of warranty claim should be dismissed for failure to state a claim.

B. Punitive Damages

The standard for an award of punitive damages under New York law is exacting. “The nature of the conduct which justifies an award of punitive damages has been variously described, but, essentially, it is conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.” Home Ins. Co. v Am. Home Prods. Corp., 75 NY 2d 196, 203 (1990) (internal citations and quotation marks omitted). “Such conduct need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness.” Id.

At this early stage in the litigation, the court is not persuaded that the plaintiffs should be prohibited from seeking punitive damages. A motion to dismiss a prayer for punitive damages should only be granted if the plaintiffs have “failed to allege facts sufficient to demonstrate that the [defendants] engaged in conduct which rose to the high level of moral culpability necessary to support a claim for punitive damages.” Financial Servs. Vehicle Trust v Saad, 72 AD 3d 1019, 1021 (2nd Dept. 2010). Here, construing all allegations liberally and in the plaintiffs’ favor, the complaint permits an inference that the defendants acted with wanton negligence or recklessness insofar as the plaintiffs claim they knew about, but failed to warn users of, extremely serious health risks associated with use of their benzene-containing products. See Home Ins. Co. v Am. Home Prods. Corp., supra (punitive damages available in strict products liability case where theory of liability was failure to warn and there was evidence that failure was wanton or in conscious disregard of rights of others).

To be sure, the bar remains high, and the likelihood that the plaintiffs can meet their evidentiary burden on punitive damages at a later phase is slim. The complaint’s generalized group allegations against all defendants certainly would not suffice on a motion for summary

judgment or at trial. Moreover, the plaintiffs will be required to prove specific facts, beyond those establishing failure to warn in the normal course, demonstrating that the defendants were aware of and consciously disregarded a substantial and unreasonable risk associated not merely with benzene in general, but with the defendants' products or ingredients in particular. Nonetheless, at the pleading stage of this action, the plaintiffs' demand for punitive damages survives.

V. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Exxon Mobil Corporation and PPG Industries, Inc., and the cross-motions of defendants Atlantic Richfield Company, Albert Kemperle, Inc., Chevron U.S.A., Inc., Chevron Phillips Chemical Company, LP, Rust-Oleum Corporation, and Zep, Inc., pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss the second cause of action and the plaintiffs' demand for punitive damages (SEQ 001) are granted to the extent that the second cause of action in the complaint, sounding in breach of warranty, is dismissed as against the moving defendants, and the motions are otherwise denied; and it is further

ORDERED that the motion of defendant Safety-Kleen Systems, Inc., and the cross-motion of defendant 3M Company pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss the second cause of action and the plaintiffs' demand for punitive damages (SEQ 002) are granted to the extent that the second cause of action in the complaint, sounding in breach of warranty, is dismissed as against the moving defendants, and the motions are otherwise denied; and it is further

ORDERED that the motion of defendant Shell Oil Company pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss the second cause of action and the plaintiffs' demand for punitive damages (SEQ 003) is granted to the extent that the second cause of action in the complaint, sounding in breach of warranty, is dismissed as against the moving defendant, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant E.I. du Pont de Nemours and Company pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) to dismiss the second cause of action and the plaintiffs' demand for punitive damages (SEQ 005) is granted to the extent that the second cause of action in the complaint, sounding in breach of warranty, is dismissed as against the moving defendant, and the motion is otherwise denied; and it is further

ORDERED that the defendants, excepting Albert Kemperle, Inc., 3M Company, and Chevron Phillips Chemical Company LP, who have already done so, shall file their answers to the surviving portions of the complaint within 20 days; and it is further

ORDERED that the parties shall appear for a preliminary conference, to be conducted via Microsoft Teams, on July 9, 2021, at 10:30 a.m.

This constitutes the Decision and Order of the court.

Dated: April 8, 2021

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON