

**Tucci v Ashland, LLC.**

2023 NY Slip Op 31784(U)

May 26, 2023

Supreme Court, New York County

Docket Number: Index No. 159245/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO** PART **33M**

*Justice*

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EMILIO TUCCI, MARTA TUCCI,  
Plaintiff,

INDEX NO. 159245/2022

MOTION DATE 01/31/2023

MOTION SEQ. NO. 005

- v -

ASHLAND, LLC. F/K/A ASHLAND, INC., BASF CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO INMONT CORPORATION AND D/B/A BASF-INMONT, SUCCESSOR IN INTEREST TO AND D/B/A GLASURIT AND R-M COMPANY F/K/A RINSHED MASON COMPANY, E.I. DU PONT DE NEMOURS & COMPANY, ICC CHEMICAL CORPORATION, PPG INDUSTRIES, INC., SHELL OIL COMPANY, SUNOCO, LLC F/K/A SUNOCO, INC. (R&M), TEXACO, INC., UNIVAR USA, INC. F/K/A CHEMCENTRAL CORP., AND VAN WATERS & RODGERS, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 54, 55, 56, 57, 61, 62, 63, 64, 65, 66, 67, 68, 76

were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral argument, which took place on March 7, 2023, where Janet Walsh, Esq. appeared for the Plaintiffs Emilio Tucci (“Emilio”) and Marta Tucci (collectively “Plaintiffs”) and Silvia S. Larizza, Esq. appeared on behalf of Defendant Shell USA Inc., formerly known as Shell Oil Company (“Shell”) Shell’s partial motion to dismiss for failure to state a claim is granted in part and denied in part.

**I. Background**

This action arises out of Emilio’s alleged exposure to benzene containing products which Plaintiffs allege caused Emilio’s multiple myeloma (“MM”). Plaintiffs initiated this action via Summons and Complaint dated October 28, 2022 (NYSCEF Doc. 1). Plaintiffs allege that Emilio

was employed by General Motors Corporation from 1979 through 2022 (*id.* at ¶ 17). He worked on the paint line and paint repair line, where he was allegedly exposed to the benzene containing products (*id.*). Specifically, from 1979 through 1996, Emilio worked at the Tarrytown Plant in Tarrytown, New York. Thereafter, from 1996 through 2006, he worked at a plant in Doraville, Georgia. Emilio worked at a General Motors plant in Arlington, Texas from 2006 through 2022 (*id.*). Plaintiffs allege that Emilio's exposure to benzene-containing products during his employment caused him to be diagnosed with MM on November 2, 2021 (*id.* at ¶ 20). Plaintiffs allege that the named Defendants, amongst other things, manufactured, refined, designed, produced, packaged, sold, distributed, marketed, re-labeled, or supplied the benzene-containing products which allegedly caused Emilio's MM (*id.* at ¶ 18). Plaintiffs allege that the Defendants failed to warn Emilio about the dangers associated with the use of their benzene-containing products (*id.* at ¶ 21).

Plaintiffs allege a variety of causes of action against Defendants. Plaintiffs allege (1) negligence/gross negligence; (2) breach of implied warranty; (3) strict products liability; (4) fraudulent misrepresentation, and (5) loss of consortium (*id.* at ¶¶ 22-117).

Shell made the instant pre-answer partial motion to dismiss on January 23, 2023 (NYSCEF Doc. 54). Like Defendant PPG in motion sequence 001, Shell moves to dismiss Plaintiff's breach of the implied warranty of merchantability and fraud causes of action, as well as Plaintiff's request for punitive damages (NYSCEF Doc. 55). Aside from there being no personal jurisdiction argument, Shell's arguments for dismissal mirror its co-defendant's PPG's arguments made in motion sequence 001 (*see* NYSCEF Docs. 7 and 57). Likewise, Plaintiffs' arguments in opposition to Shell's motion to dismiss are largely identical to the arguments Plaintiffs made in opposition to

PPG's motion to dismiss (*see* NYSCEF Docs. 42 and 61). Thus, for the sake the Court incorporates the summary of arguments made in this Court's Decision and Order on motion sequence 001.

## II. Discussion

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Shell's motion to dismiss Plaintiffs' fraudulent misrepresentation claim is denied. To sufficiently allege fraudulent misrepresentation, a plaintiff must allege (1) defendant made a material false representation, (2) defendant intended to defraud plaintiffs thereby, (3) plaintiffs reasonably relied upon representation, and (4) plaintiffs suffered damages as a result of their reliance (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [1st Dept 2005] citing *Swersky v Dreyer and Traub*, 219 AD3d 321 [1st Dept 1996]). CPLR 3016(b) imposes a heightened pleading standard for fraud, however, that requirement is not to be interpreted "to prevent an otherwise valid cause of action in situations where it may be 'impossible to detail the circumstances constituting a fraud'" (*Pludeman v Northern Leasing Systems, Inc.* 10 NY3d 486, 491 [2008] citing *Lanzi v Brooks*, 43 NY2d 778, 780 [1977] quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d

187, 194 [1968]). Plaintiffs here specifically allege that the Defendants knew their products had dangerous levels of benzene yet manipulated public information to give the impression their products were safe, and prevented disclosure of information regarding the true and full nature of the health hazards of benzene (NYSCEF Doc. 1 at ¶¶ 56 and 80-84). Plaintiffs allege that Emilio relied upon the fraudulent misrepresentations and omissions made by Defendants, including Shell, and as a result, he contracted MM (*id.* at ¶¶ 113-114). At this juncture, and under the liberal CPLR 3211(a)(7) standard, the Court finds that the detailed allegations regarding Shell's allegedly fraudulent conduct is sufficient to state a claim for fraudulent misrepresentation.

Shell's motion to dismiss Plaintiffs' request for punitive damages is denied. A request for punitive damages is allowed where, as here, a defendant is alleged to have acted in a grossly negligent fashion (*11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 81 AD3d 516 [1st Dept 2011]; *Fonda v 157 E. 74th Co.*, 158 AD2d 297 [1st Dept 1990]). At this stage, where the gross negligence and fraudulent misrepresentation claims still stand, it is premature and unwarranted to strike the demand for punitive damages.

Shell's motion to dismiss Plaintiffs' cause of action for breach of the implied warranty of merchantability is granted in part and denied in part. Pursuant to U.C.C. § 2-314(2)(c) there may be a breach of the implied warranty of merchantability if goods are unsafe "when used in the customary, usual and reasonably foreseeable manner" (*Denny v Ford Motor Co.*, 87 NY2d 248, 258-259 [1995]). Here, it is alleged that the Shell products used were unsafe in that they caused cancer when they were used for their usual and customary purpose. Accepting all of Plaintiffs' allegations as true, as this Court must on a pre-answer motion to dismiss for failure to state a claim, the allegations sufficiently allege breach of the implied warranty of merchantability. However, Shell is correct that the statute of limitations limits Plaintiffs' claims, and therefore the breach of

the implied warranty of merchantability claim is limited to any exposure to Shell products on or after October 28, 2018. Any other alleged breaches of the implied warranty prior to October 28, 2018 are time barred and therefore dismissed.

Accordingly, it is hereby,

ORDERED that Shell's motion to dismiss is granted solely to the extent that Plaintiffs' second cause of action alleging breach of implied warranty is dismissed as to any alleged breaches of the implied warranty prior to October 28, 2018; and it is further

ORDERED that Shell's motion to dismiss is otherwise denied; and it is further

ORDERED that the parties are directed to appear for an in-person preliminary conference with the Court on June 21, 2023 in Room 442, 60 Centre Street, New York, New York at 9:30 a.m. If the parties agree to a proposed preliminary conference order prior to the conference, the parties shall e-mail the proposed order to SFC-Part33-Clerk@nycourts.gov, thereby obviating the need to appear in-person; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/26/2023  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: