

Watt v BP Prods. N. Am. Inc.

2024 NY Slip Op 33961(U)

November 7, 2024

Supreme Court, New York County

Docket Number: Index No. 151554/2024

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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INDEX NO. 151554/2024

HARRINGTON WATT, GRACE WATT,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 004

- v -

BP PRODUCTS NORTH AMERICA INC., CARBO INDUSTRIES, INC., CHEVRON U.S.A. INC. F/K/A GULF OIL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HESS CORPORATION, ENERGY TRANSFER (R&M), LLC F/K/A SUNOCO, LLC (R&M) F/K/A SUNOCO, INC. (R&M) F/K/A SUN COMPANY, INC. AND F/K/A SUN OIL COMPANY, INC., EXXON MOBIL CORPORATION, HESS CORPORATION, MARATHON PETROLEUM CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO MARATHON PETROLEUM COMPANY LLC F/K/A MARATHON ASHLAND PETROLEUM LLC, NORTHVILLE INDUSTRIES CORP., SHELL USA, INC. F/K/A SHELL OIL COMPANY, SPRAGUE OPERATING RESOURCES LLC, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO CARBO INDUSTRIES INC., TEXACO INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO TEXACO REFINING AND MARKETING, INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 22, 23, 24, 25, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and after oral argument, which took place on August 6, 2024 with William Perrelli, Esq. appearing for BP Products North America Inc. (“BP”), and Anthony P. Mastroianni, Esq. appearing for Plaintiffs Harrington Watt (“Harrington”) and Grace Watt (collectively “Plaintiffs”), BP’s motion to dismiss is granted in part and denied in part.

I. Background

This action arises from Harrington’s alleged benzene exposure as a driver transporting gasoline, diesel fuel, aviation fuel, kerosene, and heating oil products to numerous fueling stations

and petroleum supply and distribution centers (NYSCEF Doc. 1 at ¶ 21). Harrington was employed in this line of work from 1985 through 2022 (*id.*). Plaintiffs allege that as a result of this work Harrington contracted multiple myeloma on January 21, 2022 (*id.* at ¶ 25). Plaintiffs allege numerous causes of action, including (1) negligence and gross negligence; (2) strict products liability; (3) fraudulent misrepresentation; (4) breach of warranty, and (5) loss of consortium.

BP now moves for partial dismissal, arguing that Plaintiffs have failed to state a claim for fraudulent misrepresentation and breach of warranty. Finally, BP argues Plaintiffs' demand for punitive damages should be stricken.

BP argues that the fraudulent misrepresentation claim should be dismissed because it is not pled in sufficient detail pursuant to CPLR § 3016(b). As for breach of warranty, BP argues there can be no claim for breach of an express warranty as there are no facts regarding the language of any express warranty or how said warranty was made. They also argue that since the statute of limitations for breach of warranty is limited to a four-year statute of limitation, and Plaintiffs allege exposure dating back decades, this cause of action must be pruned. BP argues that Plaintiffs have failed to allege sufficient conduct to justify an award of punitive damages.

In opposition, Plaintiffs have withdrawn their claim for breach of express warranty and concede that their claim for breach of implied warranty is subject to the applicable statute of limitations. However, they argue that they have stated a claim for strict products liability based on design defect. Specifically, Plaintiffs allege that BP products, including gasoline, diesel fuel, kerosene, and heating oil were defectively designed because they contained benzene which causes cancer and permanent genetic damage. They further allege that the products were defectively designed because they were packaged in a way that increased the risk of benzene exposure.

Plaintiffs further oppose dismissal of the fraudulent misrepresentation claim and that the pleadings satisfy CPLR 3016(b) as they contain sufficient facts and circumstances to permit a reasonable inference of the alleged fraud. Finally, Plaintiffs argue that the claim for punitive damages should not be dismissed, especially as BP has not moved to dismiss the gross negligence claim asserted against it.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines 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]).

Nonetheless, the sole criterion for a Court to determine on a motion to dismiss for failure to state a claim is whether the pleadings, from its four corners, taken together as a whole, manifests any cause of action cognizable at law (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Whether a Plaintiff can ultimately establish its allegations is not taken into consideration in deciding a motion to dismiss (*id.*).

B. Breach of Warranty

Plaintiffs have already agreed to withdraw, without prejudice, their claims for breach of express warranty. Thus, to the extent the Complaint contained allegations related to breach of express warranty, those claims are dismissed without prejudice. Moreover, Plaintiffs agree that their breach of implied warranty claims are subject to a four-year statute of limitations, and thus Plaintiffs' breach of implied warranty claim is dismissed to the extent they allege a breach prior to February 21, 2020.

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]). This Court and other Courts in New York in analogous benzene cases routinely find viable breach of implied warranty causes of action where, as here, plaintiffs allege that certain goods are alleged to cause cancer as a result of their benzene content (*Tucci v Ashland, LLC*, 2023 NY Slip Op. 31728[U] [Sup. Ct., NY Co. 2023]; *Pellegrino v US Steel Corp.*, 2020 NY Slip Op 31217[U] [Sup. Ct., Kings Co., 2020]; *Smith v Ashland, Inc.*, 2018 NY Slip Op 32448[U] [Sup Ct, NY Co 2018]). Here, Plaintiffs allege that BP's benzene-containing products were inherently dangerous, poisonous, not safe as marketed, and are cancer causing by increasing benzene exposure through BP's products intended and foreseeable use while simultaneously failing to provide a warning as to the dangers of benzene exposure (NYSCEF Doc. 1 at ¶¶ 157-64). As this is a pre-answer motion to dismiss, where the Court accepts the pleadings as true and makes no judgment on the merits of the claim, the Court finds that Plaintiffs have sufficiently stated a claim for breach of implied warranty.

C. Fraudulent Misrepresentation

The portion of BP's motion to dismiss seeking dismissal of Plaintiffs' fraudulent misrepresentation claim is denied. To sufficiently allege fraudulent misrepresentation, a plaintiff must allege that (1) defendant made a materially false representation; (2) defendant intended to defraud plaintiffs; (3) plaintiffs reasonably relied upon the misrepresentation, and (4) plaintiffs suffered damages as a result (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [1st Dept 2005]). While BP is correct that CPLR 3016(b) imposes a heightened pleading standard for fraud, that requirement is not meant 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]).

Here, Plaintiffs have alleged that the Defendants, including BP, had specific knowledge that benzene exposure led to a high risk of injury or death and had obtained this knowledge through their own testing and research or through participation in industry and trade organizations. Plaintiffs allege that nonetheless, Defendants concealed the danger of benzene containing products. Plaintiffs allege that BP specifically knew about the dangers of benzene no later than 1948 yet distributed benzene containing products without any warning of its potential dangers.

BP's argument that a fiduciary relationship must be pleaded to state a claim for fraudulent misrepresentation is contrary to First Department precedent (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472 [1st Dept 2009]). In *Stanfield*, the First Department did not limit fraudulent concealment to cases where there exist only fiduciary relationships, but explicitly stated that fraud based on failure to disclose may exist where there is "some other independent duty owed" by a defendant to plaintiffs (*id.* at 476). Moreover, at this

pre-answer motion to dismiss stage, it can be inferred that the producer, distributor, or merchant of an allegedly dangerous product has a duty to warn the general public about an allegedly high risk of developing cancer associated with prolonged use of their products. Here, BP did not move to dismiss the negligence/gross negligence claims and therefore do not deny that Plaintiffs has adequately pleaded, for purposes of a pre-answer motion to dismiss, that BP owed Plaintiffs a duty. Moreover, at this pre-answer motion to dismiss stage, it can be inferred that the producer, distributor, or merchant of an allegedly dangerous product has a duty to warn the general public about an allegedly high risk of developing cancer associated with prolonged use of their products. Thus, simply because the duty is not explicitly pleaded as a fiduciary duty is not fatal to Plaintiffs' fraudulent misrepresentation claim. Therefore, Plaintiffs' fraudulent misrepresentation claim survives.

D. Punitive Damages

While the Court agrees with BP that punitive damages are to be awarded in rare circumstances for purposes of a pre-answer motion to dismiss, the Court finds that at this juncture Plaintiffs' punitive damages claim should survive. This is especially true here, where BP did not move to dismiss Plaintiffs' gross negligence claim which, if ultimately proven at trial, could give rise to a claim for punitive damages (*see e.g. 11 Essex Street Corp. v Tower Ins. Co. of New York*, 81 AD3d 516 [1st Dept 2011] [where allegations of gross negligence implicates public safety, punitive damages may be awarded if allegations ultimately proven]).

Accordingly, it is hereby,

ORDERED that Defendant BP Products North America Inc.'s motion to dismiss is granted solely to the extent that Plaintiffs' claim for breach of express warranty is dismissed without

prejudice and Plaintiff’s claim for breach of implied warranty is dismissed for any breach alleged to have occurred prior to February 21, 2020; and it is further

ORDERED that Defendant BP Products North America Inc.’s motion to dismiss is otherwise denied; and it is further

ORDERED that within twenty days of entry of this Decision and Order, BP Products North America Inc. shall file and serve an Answer to Plaintiff’s Complaint; and it is further

ORDERED that the parties shall meet and confer and submit to the Court, via e-mail to bgilmartin@nycourts.gov, a proposed preliminary conference order no later than November 20, 2024. In the event the parties are unable to agree to a proposed preliminary conference order, they are directed to appear for an in-person preliminary conference at 10:30 a.m. in Room 442, 60 Centre Street, New York, New York on December 4, 2024; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order with notice of entry on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>11/7/2024</u> DATE					<u>Mary V Rosado Jsc</u> HON. MARY V. ROSADO, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
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