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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190367/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

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GASPAR HERNANDEZ-VEGA,

Seq 005

Plaintiff

-against-

AIR & LIQUID SYSTEMS CORP.., et al

Defendants

----------X

In this action, plaintiff Gaspar Hernandez-Vega ("plaintiff") contends that he developed mesothelioma during his career as a pipe fitter in Puerto Rico, Massachusetts, Virginia and New York. As is relevant to this motion, plaintiff asserts that he was exposed to asbestos from the moving defendant's valves during his career, which spanned from approximately 1964 through 1978. It is undisputed that the moving defendant manufactured and sold valves containing asbestos packing and gaskets, and sold asbestos-containing replacement packing and gaskets.

Fisher Controls International LLC ("Fisher") moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross-claims against it. If its motion is not granted, Fisher seeks dismissal of the following "Counts" in plaintiff's complaint: Count II (Breach of Warranty), Count V (Conspiracy/Collective Liability/Concert of Action), Count X (Market Share Liability/Joint and Several Liability), and Count XI (Punitive Damages).

Fisher submits the affidavit of Ronald E. Duimstra ("Duimstra") in support of its motion. Duimstra states that Fisher never manufactured or supplied flange gaskets[1] or recommended

[1]Plaintiff explained that a flange is a piece that connects a pipe and a valve. A gasket is a piece placed between flanges (Ex E, Tr at 386-387).

asbestos-containing flange gasket material for use with Fisher valves. Duimstra also states that Fisher had no role in promoting the use of Cranite flange gasket material with Fisher valves. He further states that Fisher valves do not require the use of asbestos-containing packing; that Teflon was the most widely used packing since the early 1960s; and that any packing sold by Fisher for use with its valves was pre-sized.

Arguments

Fisher maintains that this court lacks both general and specific jurisdiction. This argument was not waived, Fisher asserts, because it only learned the details of plaintiff's "limited" nine month occupational history in New York when plaintiff was deposed in January, 2015. Then Fisher's counsel reasons in a clever, yet ultimately unpersuasive, argument:

> As explained in detail below, Fisher did not have a duty to warn of any hazards associated with "Cranite" flange gaskets that Fisher did not manufacture, supply or specify for use with its valves. Without tortious conduct (failure to warn) on behalf of Fisher in New York, or exposure to asbestos in New York attributable to Fisher's activities elsewhere, the Court lacks specific jurisdiction over Fisher under New York's long arm statute.

Lesser Amended Aff ¶ 5.

Fisher highlights plaintiff's testimony that his work in New York was limited to installing new Fisher valves on a new supertanker at the Brooklyn Navy Yard. Accordingly, plaintiff did not re-pack old Fisher valves. Fisher cites plaintiff's testimony that he recalled working with Cranite gasket material in the Brooklyn Navy Yard (plaintiff also stated that he might have also used other brands, but he could not recall the names). Thus, at the Brooklyn Navy Yard, Fisher asserts that plaintiff "only worked with new 'Cranite' flange gasket material in conjunction with Fisher valves" (Lesser Reply Aff ¶ 11). Fisher cites plaintiff's testimony describing his work with flange gaskets, and extrapolates from that testimony that plaintiff's work was "limited" to making, installing and

replacing flange gaskets, which Fisher never manufactured or supplied. Accordingly, defense counsel asserts that "the only issue before the Court is whether Fisher had a 'sufficiently' significant role, interest or influence in the [selection of Cranite flange gasket material] used with its product." (Lesser Reply Aff ¶ 21; *see also* Lesser Amended Aff ¶ 30). As to that issue, Fisher argues that plaintiff has failed to demonstrate that Fisher had "a sufficiently significant role, interest, or influence" in the selection of flange gaskets (*Matter of New York City Asbestos Litig. (Konstantin)* (121 AD3d 230 [1st Dept 2014]), and specifically, Crane Co.'s Cranite flange gaskets.

While Fisher maintains that the only issue before the court is whether it had a significant role, interest or influence in the selection of Cranite flange gasket material, Fisher recognizes and addresses another issue. In Paragraphs 76 and 83-100 of Lesser's Amended Affirmation and in paragraphs 46-50 of Lesser's Reply Affirmation, Fisher contends that it is entitled to summary judgment despite plaintiff's testimony that he was exposed to asbestos when he removed, made, and installed gaskets and packing in old Fisher valves at Converse Roberts in Massachusetts. Fisher points out that although plaintiff identified its valves from the name written on the valve, plaintiff did not identify the manufacturer or supplier of the packing that he installed in Fisher valves. Additionally, plaintiff described cutting packing from rolls at Converse Roberts, but Fisher never sold packing in bulk form. Moreover, Fisher asserts that plaintiff is not "qualified" to identify the packing as containing asbestos based on its color.

Plaintiff counters that the defense of personal jurisdiction was waived under CPLR § 3211 (e) because Fisher did not make a pre-answer motion to dismiss the complaint and failed to assert personal jurisdiction as an affirmative defense in its answer. Further, plaintiff asserts that Fisher failed to meet its burden of proof to demonstrate that its product could not have caused plaintiff's

injury. Plaintiff points to the deposition testimony of Duimstra in a California asbestos litigation. In that deposition, Duimstra conceded that Fisher sold asbestos-containing valve packing and gaskets, which the company phased out from 1985 through 1987 (Ex 9, Tr at 33, 205). He conceded that Fisher sold asbestos-containing packing to its customers as early as the 1960s (*id.* at 149, 206-07). Although Duimstra testified that Fisher packing and gaskets were not dangerous due to encapsulation, Fisher also made asbestos-containing replacement parts because the gaskets and packing could wear out (*id.* at 207-208).

Plaintiff also cites to his testimony detailing the procedure that he used for three years while working at Converse Roberts to remove old packing from Fisher valves with various tools, resulting in the generation of dust (Ex 2, Tr at 198-201). Plaintiff further cites to his testimony regarding how he made and installed new packing in Fisher valves at other jobs, which generated dust (*id.* at 202-204).

Fisher also knew of the hazards of asbestos, plaintiff asserts, and failed to warn customers and end users about those hazards. In its answer to interrogatory 66, Fisher states that it "became aware in the 1970s that it was believed that certain friable forms of asbestos could pose a health hazard under certain circumstances" (Ex 8). Despite admitting knowledge of asbestos hazards in the 1970s, Fisher stated in its answer to Interrogatory 22 that it did not warn purchasers or ultimate users of the hazards because "it did not anticipate that these products posed any risk of harm to end users that would have indicated a need for warnings" (Ex 8). Although it did not warn customers, its answer to interrogatory 79 reflects that during an undisclosed period Fisher "implemented procedures at its facilities relating to the handling of asbestos-containing materials by its employees (*id.*). Duimstra stated that he did not believe that Fisher ever warned its customers of the hazards

of asbestos (Ex 9, Tr at 149, 206-207). Duminstra acknowledged that prior to the 1985 asbestos elimination program, Fisher continued to use asbestos gaskets and packing because the alternatives "in some cases" were too expensive (Ex 9, Tr at 364).

Additionally, plaintiff asserts that Fisher encouraged the use of asbestos with its valve products. To support this argument, plaintiff cites the deposition testimony of Duimstra in two California actions (Ex 8 and 9). In Duimstra's testimony, he discusses a 1965 edition of Fisher's Control Valve Handbook (the "Handbook") which provides that "[t]he standard gasket material for control valve bodies is asbestos sheet" (Ex 8, Tr at 98), and encourages customers to use "standard asbestos gaskets at the flanges" (*id.* at 91). Duimstra agreed that the Handbook listed asbestos containing materials under "Body Gaskets" although he suggested that for different applications, a non-asbestos option might be available (*id.* at 101). Duimstra agreed that the 1977 edition of the Handbook listed Teflon-impregnated asbestos and graphited asbestos for sale (Ex 9, Tr at 144, 148). Fisher also instructed customers to "sand" packing for a particular Teflon asbestos packing box and clean gasket seating surfaces when installing a new bonnet gasket which had an asbestos option (*id.* at 324, 326). Duimstra further admitted that the Handbook provided that "asbestos gaskets are necessary" in high temperature control valves (*id.* at 190). Duimstra conceded that a Fisher spare parts manual listed asbestos gaskets for sale (*id.* at 159-185) and valve repair kits with asbestos gaskets (*id.* at 325).

In reply, Fisher reiterates its arguments. It also discounts plaintiff's evidence because Fisher had non-asbestos options, and because the Handbook merely outlined the common practices of the industry and therefore was only "informative" but not "advisory." Plaintiff also conflates three separate products (internal valve body gaskets, packing and flange gaskets) "in an effort to shift the

court's focus away from the only product at issue: Cranite flange gaskets" (Lesser Reply Aff ¶ 26). Fisher further maintains that the Handbook does not support plaintiff's argument because it concerns body gaskets, and only mentions flange gaskets once.

Relevant Law

A. Jurisdiction

CPLR 3211 [e] provides in relevant part that:

> [A]n objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law... An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

A defendant waives any objection to personal jurisdiction by not raising it in a pre-answer motion or in its answer (*Hodson v Vinnie's Farm Mkt.*, 103 AD3d 549 [1st Dept 2013]).[2] This is true even where a defendant claims that long-arm jurisdiction is absent (*see Wideman v Barbel Trucking*, 3 AD3d 449 [1st Dept 2004] [defendant's prior appearance and motion to dismiss on grounds other than jurisdiction constituted a waiver of the long-arm jurisdictional defense]; and *Wiesener v Avis Rent-A-Car*, 182 AD2d 372 [1992] [defendant waived the argument that the court lacked long-arm jurisdiction because the defendant asserted only a defense predicated upon improper service in its answer, but omitted an objection based on long-arm jurisdiction]).

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[2]A defendant may add a jurisdictional defense by an amendment of answer as of right (*see Iacovangelo v Shepherd*, 5 NY3d 184 [2005]).

B. Product Identification

A defendant moving for summary judgment under CPLR 3212 (b) must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).[3] An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig.* (*DiSalvo*), 123 AD3d 498 [1st Dept 2014]).

Thus, in asbestos cases a defendant seeking summary judgment must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (id. at 463). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). It is also well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg.* (*Brooklyn Nav. Shipyard Cases*), 188

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[3]CPLR 3212 (b) provides, in relevant part:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821 [1993]).

It is not plaintiff's burden on summary judgment to establish that the product contained asbestos. This is true even if a plaintiff disbelieves that a product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]). In *Berensmann,* despite plaintiff's belief that the product did not contain asbestos, the First Department held that (except as to the wallboard product which "undisputedly" never contained asbestos) summary judgment was properly denied because the evidence demonstrated that the moving defendant manufactured asbestos joint compound at the relevant times, and failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*see Berensmann,* 122 AD3d at 521, *supra* [citing *Reid,* 212 AD2d at 463, *supra*]).

Further, issues of fact exist even where a defendant manufactures or sells non-asbestos products, along with asbestos products (*id.* [although record showed that defendant began to manufacture and ship asbestos-free product around the time when plaintiff purchased defendant's product, issues of fact remained as to whether asbestos-free product was available in Manhattan where plaintiff purchased product]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60 [1st Dept 1995] ["Supreme Court's conclusion that plaintiff's allegations are 'not credible' therefore constitutes the impermissible determination of an issue that must await trial"]). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight

and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]). Thus, it was reversible error for the supreme court to reject, "as being unworthy of belief" the testimony of a plaintiff in a separate action which was offered in opposition to defendant's summary judgment motion (*id.*).[4] A defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product also merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

C. Duty to Warn

Manufacturers and sellers in the normal course of business are liable for injuries caused by ordinary negligence, and are therefore under a duty to exercise reasonable care (including to warn) so as to avoid the occurrence of injuries by any product which can reasonably be expected to be dangerous (*Gebo v Black Clawson Co*, 92 NY2d 387 [1998]).

However, a manufacturer has no duty to warn "about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer" and where the manufacturer had "no control of the production . . . no role in placing that [product] in the stream of commerce, and derived no benefit from its sale" (*Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992]) [a tire manufacturer has no liability for a defective rim which exploded because the defendant did not manufacturer the rim which was later attached by a third party to its tire after the tire was sold]).

Similarly, in the asbestos context, where a defendant manufacturers a safe product, it has no

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[4]This is a particularly important jury function in asbestos cases, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present.

duty to warn of another company's asbestos-containing product "where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*).[5] However, there is such a duty "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product" (*id.; see also Berkowitz v A.C. & S, Inc.*, 288 AD2d 148, [1st Dept 2001] ["While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [the defendant] knew would be made out of asbestos"]).

For a "bare metal" product, the New York appellate courts have not squarely addressed the question of who bears the burden on summary judgment to demonstrate that the defendant did not have "any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). However, the burden is logically placed on a plaintiff, given that the nature of the "bare metal" defense is that there is nothing wrong with the product when it leaves the control of the manufacturer or seller.

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[5]In asbestos litigation this is known as the "bare metal" defense. The term is used to refer to product (normally made of metal) was placed in the stream of commerce without asbestos-containing materials, i.e., was made of bare metal only (*see Matter of New York City Asbestos Litig.*, 2013 NY Slip Op 32846 (U) [New York County 2013]).

Discussion

Fisher admits that it did not assert lack of personal jurisdiction as an affirmative defense in its answer on October 15, 2014 and did not bring a motion to dismiss for lack of jurisdiction prior to filing its answer (Lesser Aff ¶ 43). In an attempt avoid the plain language of CPLR § 3211 (e), Fisher unpersuasively cites *Gucci America, Inc. v Weixing Li* (768 F3d 122 [2d Cir 2014]). In that case, the court held that personal jurisdiction was not waived by a non-party bank despite the fact that the argument was not made in the lower court. Not only was the case decided based on a change in the law, but under the Federal Rules of Procedure 12 (h), the court noted that "the Bank is not a 'party' that could fail to assert its personal jurisdiction defense in an answer or a motion to dismiss." Fisher also cites *Knapp, Jr. v Shoemaker*, 82 AD2d 15 [4th Dept 1981]), where the court dismissed an action after retroactively applying a change in the law regarding quasi in rem jurisdiction. In that case, however, the court noted that the First Department had decided the issue to the contrary and, in any event, the defendant had asserted the affirmative defense of lack of personal jurisdiction broad enough to encompass an attack on quasi in rem jurisdiction. Fisher's citation to *Licci v Lebanese Canadian Bank* (20 NY2d 327 [2012]) is even more tenuous as the cited quote involves the analysis of determining what facts constitute "purposeful availment." Here, the issue is waiver.

Unable to find appropriate case support, Fisher asks "what should a defendant do when the jurisdictional defense does not arise until after the time for making a CPLR 3211 motion has expired and the answer has already been served?" However, unlike changes in the law, the jurisdictional defense did not arise until after the CPLR 3211 time expired. Rather, what changed was counsel's belief regarding the strength of the defense based on plaintiff's deposition testimony. Moreover, Fisher did not even make the jurisdictional argument until seven months after plaintiff's deposition,

when it had all the information that it professed to previously lack. As to counsel's question, it is for counsel to decide what a defendant should do to preserve a jurisdiction defense under the law.

In any event, defendant has not demonstrated why the court should depart from the statute's plain language, which is structured such that the issue of jurisdiction is flushed out at the inception of the case (*see Addesso v Shemtob*, 70 NY2d 689 [1987] [defendant waived jurisdiction by filing a motion to dismiss on grounds other than jurisdiction and later complaining that the court lacked personal jurisdiction because "[t]here is no reason to depart from the statute's plain language"]).

Except as to dismissal of certain "Counts" described below, Fisher is not entitled to summary judgment because it has failed to proffer unequivocal evidence that its product could not have contributed to plaintiff's injury (*Reid,* 212 AD2d at 463, *supra*; *Berensmann* 122 AD3d at 521, *supra, Matter of New York City Asbestos (DiSalvo),* 123 AD3d 498, *supra*). It is undisputed that an unspecified number of old and new Fisher valves contained asbestos packing and gaskets.[6] Plaintiff worked with valves, gaskets and packing at multiple locations throughout his fourteen year career. Is in inappropriate to adopt Fisher's tunnel vision and focus solely on plaintiff's activities in New York with flange gaskets.

Duimstra's affidavit does not convince the court otherwise. The affidavit is more notable for what is not stated than for what is stated. While Duimstra states that Fisher valves do not require the use of asbestos-containing packing, he omits stating that Fisher valves used asbestos packing when ordered by the customer (Ex 9, Tr at 33, 205). While he states that Teflon was the most widely used packing since the early 1960s, he omits that Fisher also sold Teflon asbestos packing (*id.* at

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[6]In reply counsel concedes that "Fisher does not dispute that prior to December, 1987, some of its valves were shipped with asbestos-containing internal packing and body gaskets" and that Fisher offered "replacement body gaskets and packing" (Lesser Reply Aff ¶ 24).

323). Duimstra's statement that packing was pre-sized when sold by Fisher for use with its valves supports defendant's argument that plaintiff was really describing another company's product. However, in order for this court to credit Duimstra, the court must disregard plaintiff's testimony that he was exposed to asbestos from old Fisher valves when he removed and installed packing while performing maintenance work in Massachusetts. It is reversible error for the court to weigh the quality of the testimony and disregard portions of it "as being unworthy of belief" (*Dollas* (225 AD2d at 321, *supra*). It is for the jury, not the court, to weigh credibility (*see Berensmann; Penn v Amchem Products*, 85 AD3d 475, *supra*).

Additionally, Fisher's argument that most of the Teflon packing did not contain asbestos does not entitle it to summary judgment because Fisher also sold Teflon asbestos packing (*see Berensmann,* 122 AD3d at 521, *supra* [although record showed that defendant began to manufacture and ship asbestos-free product around the time when plaintiff purchased defendant's product, issues of fact remained as to whether asbestos-free product was available in Manhattan where plaintiff purchased product]). Fisher's argument that plaintiff was not qualified to opine as to whether Fisher valves contained asbestos packing due to the color is misplaced. Fisher bears the burden to demonstrate that its product could not have caused plaintiff's injury (*see Berensmann* [summary judgment denied where plaintiff disbelieved that defendant's product contained asbestos]).

Assuming, arguendo, that a Fisher "bare metal" product injured plaintiff, plaintiff met his burden to demonstrate that Fisher had a significant role, interest or influence in the selection of asbestos gaskets and packing with its valves. Fisher attempts to limit the issue to Cranite flange gaskets by seizing on plaintiff's recollection of his use of Cranite flange material at the Brooklyn Navy Yard. However, plaintiff spent fourteen years working with both old and new Fisher valves,

packing and gaskets in Puerto Rico, Massachusetts, Virginia and New York. Based on the previously cited evidence, plaintiff met his burden to demonstrate that Fisher exercised "a sufficiently significant role, interest, or influence" in the type of asbestos gaskets and packing used with its valve products (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*).

Furthermore, issues of fact exist for trial as to whether plaintiff was injured by Fisher valves which contained asbestos gaskets and packing (*see, e.g., Matter of Eighth Jud. Dist. Asbestos Litig.*, 92 AD3d 1259 [4th Dept 2012] [jury rationally found that Fisher was liable for the decedent's wrongful death where he repaired and refurbished asbestos-containing Fisher valves]). Additionally, even assuming that the product which injured plaintiff was "bare metal" an issue of fact exists as to whether Fisher had significant role, interest or influence in the selection of asbestos containing parts for use with the injury causing valve(s) (*see e.g. O'Donnell v Crane Co.*, Index 601183/13 [Nassau County 2015] [assuming, arguendo, that Crane's boilers contained no asbestos, plaintiff raised an "issue of fact" regarding whether Crane intended that its boilers be used with asbestos-containing materials made or sold by others]).

However Fisher's motion is granted to the extent that the court dismisses Count II (Breach of Warranty) as unopposed, Count X to the extent of Market Share Liability (but not Joint and Several Liability) and Count V (Conspiracy/Collective Liability/Concert of Action) (*see Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298, *supra* [plaintiff failed to make a showing on summary judgment that the rim manufacturers engaged in more than parallel activity; concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in 'a common plan or design to commit a tortious act'"]). In opposition to Fisher's request for dismissal of the concerted action claims, plaintiff only maintains that Fisher

failed to demonstrate that it did not act in concert with others, and unlike in *Rastelli,* does not attempt to support his argument.[7] New York has not extended Market Share Liability to cases other than DES cases (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 [2001] [rejecting, in dicta, market share liability for guns because guns are not identical products; because it is often possible to identify the manufacturers; and because there was no assertion that the manufacturers had uniform marketing techniques]). Plaintiff has also made no effort to support an extension of market share liability to asbestos cases.

Fisher's motion is denied with leave to renew regarding dismissal of Count XI (Punitive Damages), as necessary. In *Matter of New York City Asbestos Litig.* (130 AD3d 489 [1st Dept 2015]), the Court remanded the issue of punitive damages to the Coordinating Justice for a determination of the procedural protocols concerning the assertion of punitive damages claims and discovery concerning such claims.[8] In doing so, the First Department stayed any claim for punitive damages in NYCAL pending modification of the NYCAL Case Management Order. Neither party has briefed the issue of how this court should treat a motion dismiss a claim for punitive damages prior to a final determination, in light of *Matter of New York City Asbestos Litig.* Accordingly, that

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[7]In *Rastelli*, plaintiff alleged that the rim manufacturers campaigned through their trade association for OSHA to place the responsibility for safety precautions on truck maintenance employers and not on the manufacturers; decided not to issue warnings; lobbied successfully against a proposed ban on the production of all multipiece rims; and declined to voluntarily recall the multipiece rim. The Court held that these allegations and the evidence indicated parallel activity by the rim manufacturers, but did not raise an issue of fact as to whether the rim manufacturers were parties to an agreement or common scheme to commit a tort.

[8]Presently I am that Justice. I have been working with the parties in an effort to resolve this issue, among other issues, by revisiting the Case Management Order. The procedures for revisiting the Case Management Order are outlined in my August 28, 2015 decision in *Matter of New York City Asbestos Litig.*, Index Number 40000/1988 available on www.nycal.net

aspect of the motion is denied with leave to renew, as necessary.

It is hereby

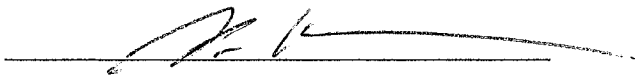
ORDERED that defendant's motion granted only to the extent that the court dismisses Count II (Breach of Warranty) as unopposed, Count X to the extent of Market Share Liability (but not Joint and Several Liability) and Count V (Conspiracy/Collective Liability/Concert of Action; and it is further

ORDERED that defendant's motion is denied with leave to renew as to Count XI (Punitive Damages) as necessary; and it is further

ORDERED that the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: November 23, 2015



J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE