UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:12-cv-01220-SVW-DTB	Date	April 17, 2012
Title	Gerald Livingston et al v. 3M Company et al		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER Re MOTION to Dismiss Plaintiffs' Complaint [69]

I. INTRODUCTION

Plaintiffs Gerald Livingston and Patricia Ann Livingston filed the instant action on February 10, 2012 against Defendants 3M Company, *aka Minnesota Mining and Manufacturing Company*, ABB Inc., *individually and as successor-in-interest ITE Imperial Co. fka ITE Circuit Breaker Company*, Autozone Inc., Autozone West Inc., The Boeing Company, *successor to McDonnell Douglas, successor-by-merger to Douglas Aircraft*, ("Boeing"), CBS Corporation, *a Delaware Corporation fka Viacom, Inc. sued as successor-by-merger to CBS Corporation a Pennsylvania Corporation fka Westinghouse Electric Corporation*, Cummins Power Generation Inc, *dba Cummins Onan successor-by-merger to Onan Corporation*, Curtiss-Wright Corporation, Eaton Corporation, *sued individually and as successor to Cutler Hammer, Inc.*, Ford Motor Company, General Electric Company, Genuine Parts Company, *dba National Automotive Parts Association aka NAPA*, Goodrich Corporation, The Goodyear Tire and Rubber Company, Gould Electronics Inc., *successor-in-interest to ITE Circuit Breaker Company*, Hewlett-Packard Company, Honeywell International, Inc., *sued as successor-in-interest to Bendix Corporation*, IMO Industries, Inc., *sued individually and as successor-in-interest to Adel Fasteners, and Wiggins Connectors*, Industrial Holdings Corporation, *fka The Carborundum Company*, Metropolitan Life Insurance Company, Nissan North America, Inc., Occidental Chemical Corporation, *fka Hookers Chemical Company*, Pneumo Abex LLC, *sued as successor-in-interest to Abex Corporation*, Parker-Hannifin Corporation, Rockwell Automation, Inc., *sued as successor-in-interest to Allen-Bradley*, Saint-Gobain Abrasives, Inc., *sued as successor-in-interest to Norton Company*, Schneider Electric USA, Inc., *fka Square D Company*, Siemens Corporation, *successor-in-interest to ITE Circuit Breaker Company*, Union Carbide Corporation, United Technologies Corporation, *sued as successor-in-interest to Pratt and Whitney* and Volkswagen Group of America, Inc.

Plaintiffs allege that Plaintiff Gerald Livingston was wrongfully exposed to asbestos as a result

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of Defendants' "wrongful conduct" during various periods of his life including: (1) his employment as an aircraft electrician during his service with the United States Airforce between 1952 and 1961, as well as his service as a reservist in 1963 (Compl. ¶ 37a); (2) his performance of maintenance both on his personal vehicles as well as on other vehicles during his employment as an auto mechanic from 1963 to 1964, and 1976 to 1977 (Compl. ¶ 37b); and (3) his employment as a general electrician and aircraft electrician from 1978 to 1992 (Compl. ¶ 37c). Plaintiffs allege that Plaintiff Gerald Livingston suffers from abestos-related disease, including but not limited to malignant mesothelioma as a result of Defendants' "wrongful conduct. (Compl. ¶ 42). Plaintiff Patricia Ann Livingston alleges injuries including a loss of society and consortium. (Compl. ¶ 43). Plaintiffs allege claims for Negligence, Strict Product Liability, and Breach of Warranty against all Defendants other than Metropolitan Life Insurance Company ("MetLife"), and a claim for Conspiracy against MetLife only.

On March 14, 2012, Defendant Boeing filed the instant Motion to Dismiss. Defendant's Motion is GRANTED WITHOUT PREJUDICE for the reasons set forth in this Order. The Court GRANTS Plaintiffs THIRTY (30) DAYS LEAVE to amend their Complaint from the date of this Order.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. See Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002). Accordingly, while a court is not required to accept a pleader's legal conclusions as true, the court must "draw all reasonable inferences in favor of the plaintiff, accepting the complaint's [factual] allegations as true." Knievel v. ESPN, 393 F.3d 1068, 1080 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his Complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

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Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

III. DISCUSSION

Under Iqbal, Plaintiffs must plead sufficient factual matter that, if accepted as true, could "state a claim to relief that is plausible on its face." See Iqbal, 129 S. Ct. at 1949. Plaintiffs must also allege facts sufficient to demonstrate "more than the sheer possibility that [Defendants] acted unlawfully." Id. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). While a Court must accept as true the factual allegations set forth in Plaintiffs' Complaint, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. Therefore, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id. at 1950 (quoting Twombly 550 U.S. at 555). Boeing argues that Plaintiffs have failed to meet the pleading standard set forth in Iqbal. The Court agrees.

As Boeing notes, Plaintiffs broadly (and vaguely) allege that Boeing is "being sued for Boeing and McDonnell Douglas aircraft," presumably based on Plaintiff Gerald Livingston's alleged exposure to asbestos during his employment with the Air Force between 1952 and 1961 and as an electrician between 1978 and 1992. (Compl. ¶ 1992). Plaintiffs have wholly failed to plead any specific facts in support of their claims as to any of the many Defendants named in Plaintiffs' Complaint, Boeing included. For example, as Boeing notes, Plaintiffs' strict products liability claim based on asbestos exposure requires that Plaintiffs plead specific facts showing that Plaintiff Gerald Livingston was exposed to asbestos as a result of a product designed, manufactured, or supplied by Boeing. Plaintiffs must also allege specific facts showing that exposure to asbestos from the Boeing product was a substantial factor in causing Plaintiff Gerald Livingston's injury. Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 982 (1997) ("In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury.").

While, of course, Plaintiffs need not prove any of their claims at the pleading stage, the Court agrees with Boeing that, under Iqbal, Plaintiffs have failed to set forth sufficient factual material in support of a plausible claim. Without identifying a specific asbestos-containing Boeing product or how Mr. Livingston was exposed to asbestos from that product, Plaintiffs fail "to raise a right to relief above

the speculative level" and their claims therefore fail. Twombly, 127 S. Ct. at 1964-65; Iqbal, 129 S. Ct. at 140-49. Furthermore, the Court finds that Coleman v. Boston Scientific Corp., No. 1:10-cv-01968 OWW SKO, 2011 WL 1532477 (E.D. Cal. April 20, 2011), which Plaintiffs cite for the proposition that they need not identify specific products containing asbestos at the pleading stage under Iqbal, is readily distinguishable from the instant action. The plaintiffs in Coleman were three individuals who underwent "transvaginal tape, bladder sling, urethral suspension, and cystocele repair" medical procedures. Coleman, 2011 WL 1532477 at *1. The plaintiffs in Coleman brought suit against one named defendant: Boston Scientific Corporation, the company that manufactured, marketed and sold a device that was implanted in the plaintiffs as part of that medical procedure. Id. The Court in Coleman reasoned that the plaintiffs' failure to name by model number the specific mesh device at issue was not fatal to their claims, reasoning that "[i]mposing on plaintiffs the burden of specifically identifying a device by reference to a specific product line or model number, without the benefit of discovery, could create an insurmountable pleading burden in some cases." Id. at *3.

As noted above, the instant action is readily distinguishable from Coleman. The plaintiffs in Coleman brought suit against one medical manufacturing company based on injuries arising from a specific medical procedure. They were unable to name the specific medical device at issue at the pleading stage due to incomplete information contained in the medical records that they had access to at that time. The Court in Coleman logically concluded that, that one minor deficiency notwithstanding, the plaintiffs had sufficiently alleged facts giving rise to a plausible claim. Here, by contrast, Plaintiffs have alleged a handful of vague facts spanning a forty-year period, and have named literally dozens of Defendants (presumably every entity that Plaintiffs could think of that could possibly have anything to do with Plaintiff Gerald Livingston's alleged asbestos exposure and Plaintiffs' alleged resulting injuries) without alleging any specific facts giving rise to a plausible claim. Accordingly, the Court agrees with Boeing that dismissal is appropriate. Furthermore, the Court finds that this analysis applies with equal force to all of the many nonmoving Defendants named in Plaintiffs' claims for Negligence, Strict Product Liability, and Breach of Warranty (i.e. all Defendants other than MetLife). Therefore, the Court finds that dismissal is appropriate as to all of those Defendants. See, e.g. Bascos v. Federal Home Loan Mortg. Corp., No. CV 11–3968–JFW (JCx), 2011 WL 3157063, *7 (C.D. Cal. July 22, 2011) (citing Bonny v. Society of Lloyd's, 3 F.3d 156, 161 (7th Cir.1993) ("A court may grant a motion to dismiss even as to nonmoving defendants where the nonmoving defendants are in a position similar to that of moving defendants or where the claims against all defendants are integrally related.")).

Plaintiffs' Conspiracy claim against MetLife fails as well. First, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." Applied Equip. Corp. v. Litton Saudi Arabia Ltd.. 7 Cal. 4th 503, 510-11 (1994) (internal citations omitted). Because the Court has dismissed Plaintiffs' first three

claims, the remaining claim for civil conspiracy cannot stand. Furthermore, as with Plaintiffs' first three claims, Plaintiffs' conspiracy claim against MetLife fails under the pleading standard set forth in Iqbal. In short, it is entirely unclear to the Court what Plaintiffs mean to allege against MetLife. Plaintiffs' Complaint vaguely alleges that MetLife "rendered substantial aid and assistance to the manufacturers of asbestos-containing products," conducted various tests, and published results of those tests, and that Plaintiffs somehow relied on those results to their detriment. (Compl. ¶¶ 66-68). However, as with Plaintiffs' other claims, Plaintiffs have failed to plead any *specific* facts in support of their conspiracy claim against MetLife. To illustrate, while Plaintiffs' Complaint broadly alleges the possibility of asbestos exposure over a forty year period, Plaintiffs do not allege a date, or even a *reasonable range* of dates as to when the alleged tests conducted by MetLife and the resulting publication of test results occurred. Accordingly, the Court concludes that dismissal of this claim is appropriate as well.

IV. CONCLUSION

Defendant's Motion is GRANTED WITHOUT PREJUDICE as to all Defendants for the reasons set forth in this Order. The Court GRANTS Plaintiffs THIRTY (30) DAYS LEAVE to amend their Complaint from the date of this Order.

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