

Rose v The American Tobacco Company

2004 NY Slip Op 30191(U)

September 27, 2004

Supreme Court, New York County

Docket Number: 0101996/2002

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos

PART 53

Justice

0101996/2002

ROSE, NORMA
vs
AMERICAN TOBACCO

INDEX NO. _____

MOTION DATE _____

SEQ 7

MOTION SEQ. NO. _____

REARGUMENT/RECONSIDERATION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion


FILED

SEP 29 2004

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is decided in accordance with
accompanying memorandum decision and order.

Dated: 9/27/04



Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION J.S.C.

Check if appropriate: DO NOT POST

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X

NORMA ROSE and LEONARD ROSE,

Plaintiffs,

-against-

Index No. 101996/2002

THE AMERICAN TOBACCO COMPANY,
PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
and BROWN & WILLIAMSON TOBACCO
CORPORATION,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In this tobacco products liability action, defendants Philip Morris USA Inc. s/h/a Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, move for an order pursuant to CPLR 2221 granting reargument of their prior summary judgment motions (sequence Nos. 004, 005, and 006) and, upon reargument, granting summary judgment dismissing plaintiffs' claims for fraudulent misrepresentation, negligent misrepresentation, and breach of express warranty.

The relevant underlying facts and procedural history are fully set forth in this court's decision and order dated February 20, 2004, (the prior order) and will not be repeated here, except as is necessary for clarification. Briefly, in this action, plaintiffs allege that plaintiff Norma Rose suffered personal injuries, including lung cancer and permanent neurological damage, as the result of her use of cigarettes manufactured,

advertised, and/or sold by defendants beginning in the mid-1940's and ending in February 1993, when she successfully quit smoking.

In the prior order, this court granted (in part) three motions for summary judgment by defendants and dismissed portions of the first, second, third, sixth, seventh, and eighth causes of action for fraudulent concealment, failure to warn, and breach of the implied warranties of merchantability and fitness for a particular purpose, against all or some of the defendants. Summary judgment was granted on the merits on whether the claim was based on conduct which occurred before or after July 1, 1969, the effective date of the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969 (see 15 USC § 1331, et seq.), and whether the defendant was in business of manufacturing, marketing, and selling cigarettes during the period covered by the claim. The court directed that the remainder of the action, including the claims of fraudulent concealment, failure to warn, negligent and defective design, strict products liability, and breach of implied warranties, (to the extent that they are not federally preempted or otherwise dismissed), and the loss of consortium claim shall continue.

Defendants now seek to reargue the branches of their motions for dismissal of the portions of the second, third, and eighth causes of action based on theories of fraudulent misrepresentation, negligent misrepresentation, and breach of express warranty on grounds that plaintiffs failed to oppose

dismissal of these claims and that, in her deposition testimony, Norma Rose conceded that she did not recall having seen or heard or relied upon any statement by defendants or having heard of any of the three tobacco industry-related organizations allegedly controlled by defendants.

In opposition, plaintiffs contend that they did not abandon these claims and that plaintiffs' expert witness' affidavits demonstrate that defendants disseminated disinformation and misinformation to the public at large through the media regarding the dangers of smoking. Plaintiffs further contend that, during the 40 years that Norma Rose smoked, it is inconceivable that she was not exposed to defendants' fraudulent misrepresentations and must have relied upon them in continuing to smoke.

Reargument is granted.

To demonstrate a prima facie claim of fraud, a plaintiff must demonstrate by clear and convincing evidence the existence of a representation of material fact, falsity, scienter, justifiable reliance, and injury (Lanzi v Brooks, 54 AD2d 1057 [3d Dept 1976], affd 43 NY2d 778 [1977]). A viable claim of negligent misrepresentation requires the plaintiff to "establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided" (Grammer v Turits, 271 AD2d 644, 645 [2d Dept 2000]; Fab Indus., Inc. v BNY Financial Corp., 252 AD2d 367 [1st Dept

1998]). Each of these elements must be supported with detailed factual allegations (Small v Lorillard Tobacco Co., 252 AD2d 1, 8 [1st Dept 1998], affd on other grounds 94 NY2d 43 [1999] [dismissing fraudulent misrepresentation claim on ground that plaintiffs' allegations lacked the requisite specificity because plaintiffs failed to identify sufficient examples of misrepresentations upon which they relied]). Here, not only have plaintiffs failed to submit any evidence that Norma Rose heard, read, saw, or discussed any particular statement by any of the defendants, but Norma Rose expressly and affirmatively denies recalling such exposure (see Norma Rose, Sept. 12, 2000, ebt tr at 341 [li 3] to 344 [li 20]).

Moreover, plaintiffs cannot demonstrate the essential element of reliance, which requires the plaintiff to submit "individualized proof" (Small v Lorillard Tobacco Co., 252 AD2d at 8). The Court in Small held that the mere reading of news periodicals during the period when the negligent misrepresentations were made "falls far short of proving that [the plaintiffs] actually relied upon [the periodicals]" (id.). Here, Norma Rose affirmatively denies recalling the reading of any statements issued by defendants, either directly or through tobacco industry related councils.

For these reasons, those branches of the motions for summary judgment on the fraudulent misrepresentation and negligent misrepresentation branches of the fraud claims are granted in favor of defendants and these branches of the claims are

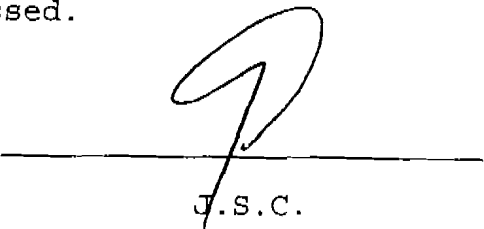
dismissed.

Summary judgment is granted without opposition in defendants' favor on the claim for breach of express warranty during January and February 1993 and the claim is dismissed. The claim is defective for the same reasons as are the negligent and fraudulent misrepresentation claims. To demonstrate a prima facie claim for breach of express warranty, the plaintiff must set forth the specific terms of the warranty upon which he or she allegedly relied (Copeland v Weyerhaeuser Co., 124 AD2d 998 [4th Dept 1986], appeal dismissed 69 NY2d 944 [1987]). Here, plaintiffs have failed to identify a single statement by defendants or their agents and have failed to allege reliance.

Accordingly, it is

ORDERED that the motion to reargue branches of motion sequence Nos. 004, 005, and 006 is granted and, upon reargument, the fraudulent misrepresentation, negligent misrepresentation, and breach of warranty claims are dismissed.

Dated: September, 27, 2004



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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