

Dimich v Med-Pro Inc.
2004 NY Slip Op 30208(U)
June 14, 2004
Supreme Court, New York County
Docket Number:
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE RICHARD B. LOWE, III
Justice

PART 56

IUAN DIMICH, individually and on behalf of others similarly situated

INDEX NO. 113 528/03

MOTION DATE 3/17/04

MOTION SEQ. NO. 00

MOTION CAL. NO. _____

- v -
MED-PRO, INC, ALBERS MEDICAL DISTRIBUTORS, INC, HD SMITH WHOLESALE DRUG COMPANY, and RTE AID CORPORATION

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 16 2004

COUNTY CLERK'S OFFICE
NEW YORK

Motion is Decided in accordance
with Accompanying Memorandum
decision

Dated: 6/14/04

JUSTICE RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 56

-----X
 WANDIMICH, individually and on behalf
 of others similarly situated,

Plaintiff,

-against-

Index No. 113528/03

MED-PRO INC., ALBERS MEDICAL
 DISTRIBUTORS INC., H.D. SMITH WHOLESAL
 DRUG COMPANY, and RITE AID CORPORATION,

Defendants.

-----X
RICHARD B. LOWE, III, J.:

Defendant Rite Aid Corporation (Rite Aid) moves, pursuant to CPLR 3211 (a) (4), to dismiss the complaint, or, alternatively, to stay the matter pending resolution of *Arons v Rite Aid Corp.*, Sup Ct, NJ, Docket No. BER-L-4641-03 (*Arons*). Defendant H.D. Smith Wholesale Drug Company (H.D. Smith) cross-moves for the same relief (Rite Aid and H.D. Smith, collectively, the moving defendants).

Plaintiff Ivan Dimich alleges that on or about May 9, 2003, he purchased a 60-tablet bottle of Lipitor from a Rite Aid pharmacy, which was later recalled by Rite Aid because the pills were counterfeit. Plaintiff alleges that on May 23, 2003 the United States Food and Drug Administration (FDA) announced that defendant Albers Medical Distributors Inc. (Albers) had voluntarily recalled three lots of counterfeit Lipitor tablets, and that on May 31, 2003, Rite Aid had, in turn, announced the recall to its customers, and advised them to refrain from taking any remaining pills. Additional recall announcements were made concerning counterfeit Lipitor tablets by the FDA and Rite Aid in June 2003.

Plaintiff further alleges that he received a recall notice from Rite Aid in June 2003, but

that by the time he received the notice, he had consumed most of the pills.

Though plaintiff makes no specific allegations that he had personal dealings with defendant H.D. Smith, he alleges that Rite Aid purchased Lipitor indirectly from Albers through H.D. Smith.

Plaintiff brings this action on his own behalf, and on behalf of a nationwide class and a sub-class of persons in New York State who purchased counterfeit Lipitor tablets, from the first date that the counterfeit Lipitor was placed into the stream of commerce, until the present.

Plaintiff **asserts** four causes of action for: fraud, breach of express warranty, violation of New York's consumer fraud statute, and negligent misrepresentation. The relief requested by plaintiff includes a permanent injunction prohibiting defendants from deceptively packaging, distributing, **and** marketing counterfeit Lipitor; the establishment of a constructive trust of monies received by defendants from the sale and distribution of counterfeit Lipitor, to compensate plaintiff **and** the class members; the establishment of a medical monitoring program for persons who took the counterfeit Lipitor; compensatory and punitive damages for plaintiff and all class members; **and** compensatory **and** treble damages for plaintiff **and** members of the **New York** sub-class.

Several weeks before this action was filed, **the Arons** case was filed in the Superior Court of New Jersey on behalf of three individuals, who purchased counterfeit Lipitor in New Jersey, **and** who seek to represent a nationwide class, and a **New Jersey** sub-class. Based upon allegations similar to those in this action, the *Arons* plaintiffs assert causes of action for breach of express ~~warranty~~ and violation of New Jersey's consumer fraud statute. The *Arons* plaintiffs also seek injunctive relief; the establishment of a constructive trust; a medical monitoring program; damages for plaintiffs and the nationwide class; and compensatory **and** treble damages for

members of *the New Jersey* sub-class. In short, though the two cases are not identical, they are very similar.

A third case **has** been filed in Pennsylvania which is purportedly similar. *See Crepeau v Rite Aid*, Ct of Comm Pleas, Philadelphia County, First Jud Dist, No. **001278**.

Defendants **Rite Aid** and H.D. Smith seek dismissal of the complaint, pursuant to CPLR **3211 (a) (4)**, based upon the action pending in the State of New Jersey. In order to dismiss an action pursuant to CPLR **3211 (a) (4)**, there must be a sufficient identity of parties **and** causes of action in the two cases. *White Light Productions, Inc. v On the Scene Productions, Inc.*, **231 AD2d 90** (1st Dept 1997). With respect to parties, there must be a substantial identity (*id.*), which is generally achieved when at least one plaintiff and one defendant are in both actions, *Proietto v Donohue*, **189 AD2d 807** (2d Dept 1993).

Although all of the defendants in this action are present in the New Jersey action, the individual plaintiffs in the two actions are different. Here, for substantial identity of parties to exist with respect to the individual plaintiffs, the New Jersey court must approve a nationwide class. It appears that class certification has not yet been sought in *Arons*, and even **assuming** certification of a nationwide class were granted by the New Jersey court, which it may not be, in order to **satisfy** requirements of due process, absent class members, such **as** plaintiff Dimich, would presumably be given notice and the opportunity to opt-out. *See Cartiglia v Johnson & Johnson Co.*, **2002 WL 1009473**, *12-13 (Super Ct of NJ 2002), citing *Phillips Petroleum Co. v Shutts*, **472 US 797** (1985). For these reasons, there is not sufficient identity of **parties** to justify dismissal **of** this case.

With respect to identity **of** claims, the *two* cases obviously arose **as a** result of the **same**

basic facts, the introduction into the stream of commerce of counterfeit Lipitor tablets, and both cases assert claims for breach of warranty. The statutory consumer fraud claims, however, are based on the laws of the individual states, **and** only cover persons who made purchases in the respective states. Dismissing this case would deprive New York residents of the opportunity to sue for violations of New York law. Thus, though there is one overlapping claim, there is not a sufficient identity of claims to justify dismissal pursuant to CPLR 3211 (a) **(4)**.

Nor is a stay of this action appropriate. Unlike in *Asher v Abbott Labs.* (307 AD2d 211 [1st Dept 2003]) cited by defendants, this is not an area of law in which the courts of New Jersey have particular expertise, and the New York consumer law claims are not encompassed within the New Jersey state claims. Therefore, defendants' request for a stay is denied, as well.

During oral argument of this motion, the parties indicated that the *Arons* case is in a somewhat more advanced position than this case, and that discovery is **being** conducted there. Although it is this court's conclusion that neither dismissing nor staying this action pending the resolution of the New Jersey action is justified, in **an** effort to minimize the burden on defendants of multiple litigation involving these overlapping claims, the next compliance conference will be scheduled to discuss such matters as methods of coordinating discovery in the two actions.

Defendants also move, pursuant to CPLR 3016 (b), to dismiss plaintiffs cause of action for fraud, for lack of specificity. That cause of action alleges **as** follows:

31. Defendants knowingly misrepresented, expressly and/or by implication, **and** intentionally omitted to state material facts regarding the fact **that** they were packaging, distributing, marketing, **and/or** selling counterfeit Lipitor that **was** not approved by the **FDA** for the treatment of high cholesterol and had not been tested for its safety or efficacy in treating such condition.

32. Defendants committed these acts with the intent to induce plaintiff and

putative class members to purchase counterfeit Lipitor pills under the false belief that these tablets were genuine Lipitor pills, which plaintiff and putative class members have been prescribed to treat elevated cholesterol. Plaintiff and putative class members reasonably relied on this intentional misrepresentation and purchased the counterfeit Lipitor and consequently suffered damages.

Complaint, ¶¶ 31 & 32.

Although it is true that where the circumstances of the fraud are peculiarly within the defendants' knowledge, it is extremely difficult for the plaintiff to state those circumstances in detail (*Jered Contracting Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]), mere conclusory allegations of fraud are not sufficient to state a cause of action. *LaSalle Natl. Bank v Ernst & Young LLP*, 285 AD2d 101, 109 (1st Dept 2001).

The elements of a cause of action for fraud are "representation of a material existing fact, falsity, Scienter, deception and injury." *New York University v Continental Ins. Co.*, 87 NY2d 308, 318 (1995), quoting *ChannelMaster Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 407 (1958). Here, plaintiff has alleged nothing that suggests that either of the moving defendants were even aware of the fact that the Lipitor tablets at issue in this litigation were counterfeit, let alone that they purposely deceived plaintiff about the nature of the Lipitor which he purchased.

Beyond alleging that the Lipitor tablets distributed or sold by moving defendants were counterfeit, plaintiffs allegations of fraud are completely conclusory, and even using the liberal pleading standards which apply to motions to dismiss, they are inadequate. The motion and cross motion of defendants Rite Aid and H.D. Smith to dismiss the first cause of action for fraud as to them is, therefore, granted, without prejudice to its being reinstated if evidence is uncovered that is adequate to sustain such a cause of action.

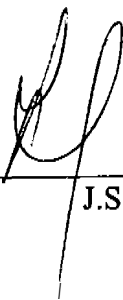
Accordingly, it is hereby

ORDERED that the motion **and** cross motion of defendants Rite **Aid** Corporation and H.D. Smith Wholesale **Drug** Company, pursuant to CPLR 3211(a)(4), to dismiss or stay this action is denied; and it is further

ORDERED that the motion **and** cross motion of defendants Rite **Aid** Corporation **and** H.D. Smith Wholesale **Drug** Company, pursuant to CPLR 3016(b), to dismiss plaintiffs cause of action for fraud is granted.

Dated:

ENTER:



J.S.C.

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK