

Dimich v Med-Pro Inc.
2005 NY Slip Op 30209(U)
April 14, 2005
Supreme Court, New York County
Docket Number: 0113528/2003
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Ivan Dimich

INDEX NO. 113528/03
MOTION DATE 1/14/05
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

- v -

MED-PRO, Inc.

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
APR 18 2005
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 4/14/05

HON. 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
IVAN DIMICH, individually and on behalf
of others similarly situated,

Plaintiff,

-against-

Index No. 113528/03

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

Defendants.

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

Motion sequence numbers 005 and 006 are consolidated for disposition.

In motion sequence number 005, plaintiff Ivan Dimich moves for reinstatement of his cause of action for fraud and for certification of a nationwide class and a New York State subclass. In motion sequence number 006, defendant Rite-Aid Corporation (Rite-Aid) moves for an order, pursuant to 22 NYCRR § 130-1.1, granting it costs and attorneys' fees incurred in responding to plaintiff's motion for reinstatement of the fraud cause of action and for class certification. Defendant H.D. Smith Wholesale Drug Company (H.D. Smith) cross-moves for costs and attorneys' fees incurred in responding to plaintiff's motion.

This case involves the sale, and later recall, by Rite-Aid of Lipitor pills, some of which may have been counterfeit. Lipitor is a drug approved by the United States Food and Drug Agency (the FDA) for treating elevated cholesterol levels.

On May 23, 2003, the FDA announced that defendant Albers Medical Distributors, Inc. (Albers) voluntarily recalled three "lots" of counterfeit 90-count bottles of 10 milligram (mg) Lipitor tablets. Subsequently, on June 3, 2003, the FDA announced that additional 10-mg and

20-mg Lipitor pills were counterfeit. H.D. Smith purchased at least some of those counterfeit pills from Albers, and, in turn, sold them to Rite Aid, through John Dillaway of Medical Specialty. During the recall period, Rite Aid purchased over 2 million ten-milligram, and over 400,000 20-milligram, Lipitor pills from H.D. Smith, some of which were counterfeit.¹

On May 23, 2003, H.D. Smith issued a recall notice regarding the 10-mg pills. On May 31, 2003, and June 6, 2003, Rite Aid issued notices to its customers, indicating that certain lots of the Lipitor were being recalled by the wholesalers, and requesting that the pills be returned to Rite Aid for replacement. There is no evidence that the counterfeit pills contained any harmful ingredients.

In his complaint, plaintiff Ivan Dimich, a retired physician, alleges that on or about May 9, 2003, he purchased a 60-tablet bottle of 20-mg Lipitor from a Rite Aid pharmacy, which was prescribed for him. The complaint further alleges that, in June 2003, plaintiff received a recall notice from Rite Aid for the Lipitor indicating that the pills were counterfeit, but that by the time he received the notice, he had consumed most of the pills. The complaint alleges that when plaintiff returned the unused pills they were replaced by Rite Aid, but that Rite Aid did not reimburse him for the pills which he had taken.

¹ According to Rite Aid, during the recall period it purchased 2,972,160 10-mg pills and 432,000 20-mg pills from H.D. Smith. Not all of those pills were actually consumed by purchasers. Of that amount, 144,405 10-mg pills and 11,682 20-mg pills that were in Rite Aid pharmacies at the time of the recall were returned to H.D. Smith. In addition, as of November 2004, Rite Aid had 42,687 10-mg pills and 13,374 20-mg pills in its possession in the original bottles that were never sold to customers. The remainder of 2,785,068 10-mg pills and 406,944 20-mg pills were co-mingled with other Lipitor pills purchased from other wholesalers or from Pfizer. During the recall period, a total of 9,562,396 10-mg and 7,121,523 20-mg co-mingled Lipitor pills were sold by Rite Aid. Thus, the potentially counterfeit pills constituted approximately 19% of the Lipitor pills sold by Rite Aid during that period. In addition, Rite Aid successfully recalled more than 3 million pills from pharmacy customers.

In response to discovery, plaintiff's allegations changed in several respects. In his deposition plaintiff stated that the prescription for Lipitor was not written for him, but rather for his wife, Alexandra Dimich, who also takes the medication. He further stated that his wife, who is a physician, at times obtained samples of Lipitor from Pfizer, the manufacturer, and that both plaintiff and his wife often shared the pills purchased with a prescription. Plaintiff estimated that he and his wife each used approximately ten pills from the 60-pill bottle which was the subject of the recall notice.

In response to interrogatories, plaintiff stated that he was currently taking two 20-mg tablets of Lipitor per day; however, at deposition he stated that, because his cholesterol level had gone down, he occasionally took only one pill per day. Also in response to interrogatories, plaintiff stated that the price of the allegedly counterfeit Lipitor was \$50; however, in his deposition he stated that the Lipitor that he purchased on May 9, 2003, was covered by medical insurance, and that, at that time, the co-pay was \$15.

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. The original complaint asserted causes of action for fraud, breach of express warranty, violation of New York's consumer fraud statute, and negligent misrepresentation. On June 14, 2004, however, this court dismissed plaintiff's cause of action for fraud as completely conclusory, without prejudice to plaintiff seeking reinstatement of that cause of action, if evidence were uncovered that provided a sufficient basis to sustain the cause of action. In that decision, this court noted that plaintiff had even failed to allege that either Rite Aid or H.D. Smith were aware of the fact that

the Lipitor pills which they had purchased were counterfeit. The relief requested in the complaint 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. Plaintiff has apparently now withdrawn his request for a medical monitoring program.

MOTION TO REINSTATE CAUSE OF ACTION FOR FRAUD

Plaintiff moves to reinstate his cause of action for common-law fraud. Because the fraud claim was dismissed as fatally conclusory, it is appropriate to treat plaintiff's motion to reinstate as though it were a motion to amend the pleadings. The court is, therefore, obliged to consider whether there is now a sufficient evidentiary basis for plaintiff's claim for fraud. For, although a motion to amend pleading will be freely granted, it may be denied where the claim is lacking in merit. *Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315 (1st Dept 1999). A copy of the proposed amended pleading should be supplied with motion to amend, and the motion may be denied where the party seeking leave fails to do so. *Ferdinand v Crecca & Blair*, 5 AD3d 538 (2d Dept 2004).

Initially, plaintiff failed to submit a proposed amended complaint with his motion to reinstate his cause of action for fraud. Instead, he relied on allegations contained in the affidavit of his attorney, Robert L. Herbst, in which Herbst claimed that there is now sufficient evidence

that defendants knew that the recalled Lipitor was counterfeit, and that they, nonetheless, placed it into the stream of commerce, to support a cause of action for fraud. Herbst further stated that there was evidence that defendants Albers and H.D. Smith both engaged in "criminal fraudulent misconduct concerning the sale and distribution of counterfeit Lipitor" (Herbst Affidavit ¶ 30) and that Douglas C. Albers, Albers' chief executive, and an H.D. Smith employee had both asserted the Fifth Amendment privilege not to testify in response to questions concerning their knowledge of the counterfeit nature of the Lipitor their companies sold. Herbst contends that an adverse inference can be drawn against Albers and H.D. Smith based upon the assertion of the Fifth Amendment.

Herbst also asserted that Rite Aid had failed to review the pedigree documentation relating to the Lipitor, in violation of Rite Aid's own practice and industry practice, and that its failures could support a reasonable inference that Rite Aid was aware that the Lipitor it purchased, and then sold, was counterfeit. Herbst did not, however, provide any evidence of either Rite Aid's, or the industry's purported practices, and merely cited 21 USC § 353 (e) (1) (A) as the basis of his assertion that Rite Aid is required to check the pedigree of the drugs it purchases.

Defendants correctly objected to plaintiff's failure to submit a proposed amended complaint with his motion. In response to defendants' objection, on reply, plaintiff belatedly submitted a proposed amended complaint which amplified, somewhat, the allegations contained in Herbst's affidavit. Normally, the court would not consider the proposed pleading submitted with reply papers, because defendants were not afforded an opportunity to respond to the allegations contained therein. As a practical matter, however, at least two of the defendants

effectively responded in connection with their motion and cross motion for sanctions, in motion sequence number 006. The court will, therefore, for economy's sake, consider the substance of the issues raised by the proposed amended pleading, with respect to those two defendants.

The proposed cause of action for fraud generally alleges that the defendants knew that the Lipitor in question was tainted, yet placed it in the stream of commerce where it was sold to plaintiff. It further alleges that Albers and H.D. Smith engaged in fraudulent misconduct concerning the sale of counterfeit Lipitor; that Albers employec, Paul Kriger, arranged to make "kickback" payments to H.D. Smith employee, Diane Coelyn,² as part of the counterfeit Lipitor scheme; and that Albers chief executive, Douglas C. Albers, Kriger, and Cocyln have asserted their Fifth Amendment privilege in response to questions concerning the counterfeit Lipitor.

With respect to Rite Aid, the proposed amended complaint alleges that "Rite Aid solicited a false letter from H.D. Smith stating 'all Lipitor products included in our repack program, which we supply, has been purchased directly from the manufacturer or another AD (Authorized Distributor) of the manufacturer.'" Proposed amended complaint, ¶ 35.³ The amended complaint also alleges, on information and belief, that Rite Aid employee, Jeanette Buck, provided the precise false language for the letter, and that H.D. Smith knew that the letter was false because of the pedigree documents it possessed concerning the Lipitor. In support of that allegation, plaintiff relies on the deposition of H.D. Smith employee, John Dillaway. Plaintiff's

² On April 16, 2004, Coelyn pleaded guilty to mail fraud and wire fraud in connection with that scheme. *United States v Coeyln*, No. 03-0396-01-W-CR-DS, D Ct, WD Mo.

³ On March 5, 2003, H.D. Smith faxed a letter to Rite Aid which stated: "To Whom It May Concern: Be advised that all Lipitor products included in our repack program, which we supply, has been purchased directly from the manufacturer or another AD (Authorized Distributor) of the manufacturer."

counsel, Brandon L. Garrett contends that, according to Dillaway, "Rite Aid specifically asked for a false 'representation' that H.D. Smith purchased the relevant product directly from an authorized distributor or manufacturer, and that Dillaway simply transcribed such language proposed by the Rite Aid employee." Reply Affirmation of Brandon L. Garrett, dated December 28, 2004, ¶ 10.

In opposition to the motion to reinstate the fraud cause of action, Rite Aid contends that it had no obligation, pursuant to 21 USC § 353 (e) (1) (A), to obtain the pedigree of the Lipitor it purchased. Section 353 (e) (1) (A) states as follows:

(1)(A) Each person who is engaged in the wholesale distribution of a drug subject to subsection (b) of this section and who is not the manufacturer or an authorized distributor of record of such drug shall, before each wholesale distribution of such drug (including each distribution to an authorized distributor of record or to a retail pharmacy), provide to the person who receives the drug a statement (in such form and containing such information as the Secretary may require) identifying each prior sale, purchase, or trade of such drug (including the date of the transaction and the names and addresses of all parties to the transaction).

21 USC § 353 (e) (1) (A).

Section 353 (e) (1) (A) is plainly addressed to wholesale distributors, not to retailers, and does not place any particular obligations on the latter. It is uncontested that H.D. Smith is an authorized distributor of Lipitor, and, therefore, had no obligation, pursuant to section 353 (e) (1) (A), to provide a statement regarding each prior purchase or sale of the pills to Rite Aid, and Rite Aid had no concomitant obligation to seek such information. Nor has plaintiff provided any evidence of an industry practice requiring Rite Aid to obtain such information, that Rite Aid violated.

Rite Aid contends that, rather than supporting allegations of fraud by Rite Aid, Herbst's

statement that "H.D. Smith ... misrepresented the origin of the Lipitor to Rite Aid" (Herbst Affirmation, ¶ 24), in fact supports an inference that Rite Aid acted in good faith when it purchased the Lipitor. Rite Aid is correct that Herbst's affirmation does not contain sufficient evidence to justify reinstatement of fraud allegations against Rite Aid.

With respect to the allegations in plaintiff's proposed amended complaint concerning the letter allegedly requested by Rite Aid, relevant portions of the transcripts of both John Dillaway and Rite Aid employee, Jeannette Buck, indicate that Dillaway never characterized the allegedly requested representation as false. Buck testified that she did not recall requesting the letter and denied having written the letter herself or having requested any specific language. Even assuming that Buck did request the letter, and the language in question, there is no evidence indicating that she believed it was false. Rather, Buck stated that she did recall that Dillaway told her that the Lipitor was either purchased directly from the manufacturer or from an AD. Deposition of Jeannette Buck, at 108-109.

Although Dillaway did testify that Buck requested the language in the letter, he indicated that when he obtained the letter from H.D. Smith, he believed that H.D. Smith had obtained the Lipitor from an authorized distributor. Deposition of John Dillaway, at 91-92. Thus, the testimony relied on by plaintiff is an insufficient basis for restoring the fraud claim against Rite Aid.

Nor is it a sufficient basis to restore the fraud claim against H.D. Smith, since it does not establish that H.D. Smith knew that it was supplying counterfeit Lipitor.

Citing, inter alia, *Marine Midland Bank v John E. Russo Produce Co.* (50 NY2d 31, 42-43 [1980]), plaintiff also contends that reinstatement of his fraud claim is justified by the fact that

Douglas C. Albers and H.D. Smith employec, Coelyn, have asserted the Fifth Amendment privilege against self incrimination in response to questions concerning their knowledge of the sale of counterfeit Lipitor.⁴ In *Marine Midland*, however, the Fifth Amendment privilege was asserted by high ranking officers of the corporation, who, themselves, were defendants in the civil action. Here, there is no evidence that Coelyn was a high ranking officer of H.D. Smith. Moreover, the indictment against Coelyn, which presumably led to her assertion of the privilege, charged her with acts, not in furtherance of her employer, H.D. Smith, but rather against their interest. Coelyn was charged with breaching her fiduciary duty to her employer by being part of a scheme to obtain commissions or kickbacks from Albers in connection with repackaging transactions between H.D. Smith and Albers, and failing to disclose that scheme to H.D. Smith. Certainly, therefore, Coelyn's assertion of the privilege against self-incrimination is not a sufficient basis to justify the reinstatement of a fraud claim against either her employer or Rite Aid.

Because plaintiff only submitted his proposed fraud cause of action with his reply papers, defendant Albers had no opportunity to respond to any substantive allegations, and plaintiff's motion to reinstate will be denied against Albers as well.

MOTION FOR CLASS CERTIFICATION

Plaintiff moves for certification 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.

⁴ Coelyn asserted the privilege as part of a partial answer to a third-party complaint in *Pfizer Ireland Pharmaceuticals v Albers Medical, Inc.*, D Ct, W D Mo, 03-0489-CV-W-ODS.

In order to obtain class certification, the plaintiff must demonstrate that:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CPLR 901.

As discussed above, during discovery, numerous factual issues arose concerning plaintiff's purchase and alleged use of the recalled Lipitor, that seriously undermine his suitability to represent the class of plaintiffs he seeks to represent. For example, the prescription for Lipitor was not written for plaintiff, but for his wife, Alexandra Dimich. Plaintiff asserts causes of action for breach of express and negligent misrepresentation; however, if any such claims exist, they would not run to him (who merely paid the \$15 co-pay for the prescription) but to his wife, for whom the prescription was written. *See Zelber v Lewoc*, 6 AD3d 1043 (3d Dept 2004); *Levine v Canon U.S.A., Inc.*, 303 AD2d 275 (1st Dept 2003). Furthermore, even assuming some of the 60 pills were taken, and, therefore, not returned to Rite Aid, they were apparently shared by plaintiff and his wife, and not taken by him alone. Additionally, in connection with its opposition to plaintiff's motion for certification of a class action, Rite Aid submits a photocopy of a document which it identifies as a screen shot from the Lipitor Recall Database, which lists prescription #295497 for Dimich, Alex, filled on 5/09/2003. That document indicates that 60 tablets were returned on 6/20/2003 and that 60 20-mg tablets were exchanged. Therefore, a

serious question has been raised as to whether, in fact, plaintiff received replacement pills for the entire 60 which were purchased on May 9, 2004.

Plaintiff argues that it does not matter whether he returned 1 pill or 60 pills, that he is still an appropriate class representative. If, however, in response to the recall notice, he actually returned 60 pills and was given 60 replacement pills, it is hard to see how he has been damaged at all, and, therefore, how he could represent a class of persons who have been damaged in some way.

In light of the information revealed in discovery concerning plaintiff's claims, it is hard to see how plaintiff could possibly meet the requirement of typicality. The court concludes that plaintiff is not an appropriate representative of the purported class, and, therefore, need not examine the other requirements which must be met to justify class certification. Plaintiff's motion for class certification is denied.

MOTION AND CROSS MOTION FOR COSTS AND ATTORNEYS' FEES

Rite Aid and H.D. Smith both move for an order, pursuant to 22 NYCRR § 130-1.1, awarding them the costs and attorneys' fees incurred in responding to plaintiff's motion to reinstate his fraud cause of action and to certify the class action.

Costs and attorneys' fees may be awarded as a sanction for engaging in frivolous conduct in litigation. Conduct is considered frivolous if:

(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1 (c).

With respect to plaintiff's motion to reinstate his cause of action for fraud, although that motion is denied, the court is not prepared to conclude that it was sufficiently without merit in law or fact to be deemed frivolous. The court is disturbed by counsel's initial failure to submit a proposed amended pleading in connection with that motion, because of the problems it created for defendants with respect to responding to his allegations, but the proposed amended complaint was ultimately submitted, and the procedural failing does not arise to the level of frivolous conduct.

Defendants suggest that the distortion of testimony by counsel for plaintiff warrants sanctions. The court agrees that Brandon L. Garrett mis-characterized John Dillaway's deposition testimony when he stated that "H.D. Smith employee John Dillaway [testified] that Rite Aid specifically asked for a false 'representation'" that the Lipitor was purchased from an authorized distributor. This Court declines to impose sanctions at this time as this allegation alone does not rise to a level where the Court is ready to impose sanctions. Plaintiff's counsel is put on notice, however, that this misrepresentation caused great concern for the Court and any such further conduct will not go unsanctioned.

With respect to the request for class certification, the motion was filed on November 30, 2004, prior to plaintiff's deposition on December 14, 2004, which resulted in the testimony that revealed his lack of suitability as a class representative.

That testimony, coupled with Rite Aid's evidence strongly suggesting that plaintiff may have

returned all of the recalled pills⁵, resulted in the decision of this court to deny plaintiff's motion for class certification without even considering the other requisites for class certification. However, there is no evidence that, at the time the motion was filed, counsel knew of plaintiff's unsuitability as a class representative, and plaintiff, as a non-lawyer, may not have understood the implications of his factual situation with respect to the certification motion. It is subsequently clear, however, after the taking of Plaintiff's deposition, that he is not a true representative. Although it would have been better practice for plaintiff's attorneys to withdraw the class certification motion after they became aware of the circumstances of his claim, there is no indication that defendants requested that he do so, and the court is not prepared to award sanctions against counsel because they failed to withdraw the motion. Again, the Court does note, that had Plaintiff's counsel been aware of the unsuitability of the Plaintiff to represent the class, the filing of this motion most certainly borders on sanctionable conduct for the filing of a frivolous motion.

In response to Rite Aid's motion for sanctions, plaintiff argues that by unilaterally opening the pill bottle marked Dimich, Alexandra, Rite Aid engaged in spoliation and should itself be sanctioned. Plaintiff notes that on the same day that the bottle was opened, the Special Master was conducting a conference with the attorneys for the parties to devise a protocol for inspection of the bottle. Spoliation, however, constitutes the destruction of evidence. *Standard Fire Ins. Co. v Federal Pacific Elec. Co.*, 14 AD3d 213 (1st Dept 2004). There is no indication

⁵ In addition to the screen shot from the Lipitor Recall Database, in connection with its motion for sanctions, Rite Aid submits affidavits of two employees who are responsible for managing the receipt and storage of recalled products who state that, on January 6, 2005, they examined the returned bottle of Lipitor pills labeled, Dimich, Alexandra and that the bottle contained 60 pills.

that the evidence here was destroyed. Rite Aid's employees state that after the pills were counted, they were placed back into the bottle, which was rescaled, and the bottle was replaced on the pallet where it had been stored. Although Rite Aid's timing in inspecting the bottle may have been unwise, there was no court order preventing it from conducting the inspection in the absence of the other parties, and there is no evidence that spoliation of evidence occurred.

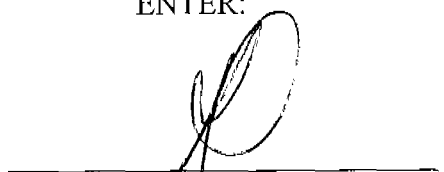
Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to reinstate his cause of action for fraud and for class certification is denied; and it is further

ORDERED that defendant Rite Aid's motion and defendant H.D. Smith's cross motion for attorneys' fees and costs are denied.

Dated: April 14, 2005

ENTER:



J.S.C.
HON. RICHARD B. LOWE, III

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