

Dimich v Med-Pro Inc.

2006 NY Slip Op 30351(U)

February 21, 2006

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

HON. RICHARD B. LOWE, III

PRESENT:

PART 56

Index Number : 113528/2003

DIMICH IVAN

vs

MED-PRO

Sequence Number : 020

DISMISS

C

INDEX NO. _____

MOTION DATE 1/4/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Motion is decided in accordance with the memorandum decision issued in motion sequence 019.

FILED
FEB 24 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/21/06

[Signature]
HON. RICHARD B. LOWE, III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 019, 020, and 021 are consolidated for disposition.

This action involves the sale, over an approximately three- month period, and later recall by defendant Rite Aid Corporation (Rite Aid) of several million Lipitor pills, approximately 19% of which may have been counterfeit. The facts are discussed in detail in this court's decision dated April 14, 2005, and will not be reiterated here, except as necessary.

In the three consolidated motions, defendants Albers Medical Distributors, Inc. (Albers), Rite Aid Corporation (Rite Aid), and H. D. Smith Wholesale Drug Company (H.D. Smith), respectively, move for summary judgment dismissing the complaint against each of them. Plaintiff submits the affirmation of Clare R. Norins, with annexed documents in opposition to the three motions.

Defendants make two arguments in support of their motions for summary judgment. Albers argues that, because approximately 80% of the Lipitor pills sold during the period in question were genuine, plaintiff cannot establish that he received pills that were counterfeit or that he was injured by Albers. Albers also joins in the argument made by Rite Aid and H.D.

Smith, that when plaintiff went to the Rite Aid pharmacy and paid the \$15 co-pay under his wife's insurance plan for a prescription that he had written for his wife, he was, at best, acting as an agent for his wife, and, under New York law, cannot maintain an action in his own name based upon either contract or tort.

Because this matter can be resolved based upon the second basis for dismissal, the court will not reach the issue raised by Albers concerning plaintiff's inability to establish that he purchased other than genuine Lipitor pills.

In considering the issue before us, it is important to remember that this case does not involve an ordinary consumer product that can be purchased and used freely by anyone. Rather, the product involved is a prescription medication. A pharmacy may not dispense such a medication without a prescription which contains, among other things, "the name and address of the patient, and the directions for the use of the drug by the patient as given upon the prescription." Education Law § 6810 (1).

It is undisputed that the pills in question were purchased under a prescription written by plaintiff for his wife, and under his wife's insurance plan. Plaintiff testified that he picked up the pills for his wife because she was working, and never had time to go to the pharmacy. Nonetheless, plaintiff argues that there is no evidence that plaintiff's wife authorized him to act as her agent, that he should not be assumed to be her agent merely because he is her spouse, and that a question of fact exists regarding whether he was acting as her agent which precludes summary judgment. The issue of agency does not arise, however, because of the spousal relationship, but rather because the patient named on the prescription was plaintiff's wife and the pills were purchased with her insurance coverage. The fact that plaintiff may have used his own

\$15 to pay the co-pay for the pills is of no moment, since an agent may expend his own funds in the execution of the agency and then obtain reimbursement from the principal. *Kelly v Schroeter*, 209 AD2d 737, 739 (3d Dept 1994). To the extent that plaintiff contends that he is entitled to reimbursement for the co-pay for the pills which he paid for from his own funds, he may look to his wife, for whom he was purchasing the medication. Furthermore, given the relative burdens of proof on a motion for summary judgment, defendants having submitted evidence that plaintiff was acting as his wife's agent in picking up the pills, it is incumbent on plaintiff to submit evidence to the contrary, and not merely complain that no specific evidence of his wife's authorization has been provided. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Moreover, agency can be created by conduct as well as by oral or written agreement. *Pyramid Champlain Co. v R.P. Brosseau & Co.*, 267 AD2d 539, 544 (3d Dept 1999).

If, however, as plaintiff argues, he was not authorized by his wife to write a prescription for her, or to purchase the medication under her insurance plan, the question arises as to whether he improperly wrote the prescription and used her insurance coverage.

To the extent that plaintiff was acting as his wife's agent, he may not properly bring an action in his own name. *Braten v Bankers Trust Co.*, 60 NY2d 155, 163 (1983). If, on the other hand, he was not acting on his wife's behalf, but, rather, intended the pills for himself and was merely designating her as the patient and using her insurance coverage solely for his own convenience, he may have been acting improperly as a physician (Education Law § 6530 [26]), and making an improper insurance claim, and should not be permitted to bring claims against defendants based upon that transaction. *Sabia v Mattituck Inlet Marina and Shipyard, Inc.*, 24 AD3d 178 (1st Dept 2005)(contract action dismissed where affidavit of plaintiff's president

established that the agreement plaintiff sought to enforce was created for an illegal purpose).

To the extent that plaintiff seeks to recover for alleged negligence by defendants (cause of action for negligent misrepresentation), he must establish that defendants had, and breached, a duty to him, rather than to his wife, with respect to the pills that he purchased. In determining whether such a duty existed the court should consider and balance the following five factors:

- (1) "the reasonable expectations of the parties and society generally; (2) the proliferation of claims; (3) the likelihood of unlimited or insurer-like liability; (4) disproportionate risk and reparation allocation; and (5) public policies affecting the expansion or limitation of new channels of liability."

Fagan v AmerisourceBergen Corp., 356 F Supp 2d 198, 206 (ED NY 2004), quoting *Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 586 (1994). The existence of a duty of care is legal matter to be decided by the court. *Fagan*, 356 F Supp 2d at 206.

Here again it must be remembered that plaintiff's wife was the designated "patient" named on the prescription for the medication in question. It would be reasonable to find that the distributors and sellers of the medication had a duty of care to her, as the patient. It is a different matter, however, to find that defendants owed a duty to plaintiff, who merely paid the co-pay for the medication. Such an expansion of their duty, certainly has the possibility of creating an insurer-like liability for distributors and sellers of medication. It is unlikely that such an expansion of duty was contemplated by the defendants.

That reasoning does not change because plaintiff may have intended to take some of the pills which were prescribed for his wife. Furthermore, in terms of public policy, there is a strong reason to conclude that defendants do not have duty of care to persons who take medication prescribed for someone else, because the courts certainly do not want to be seen as encouraging

such inappropriate use of prescription medication. The fact that plaintiff is, himself, a retired physician, does not justify an exception to that important public policy consideration. Furthermore, an agent may not bring suit because another has tortiously harmed his principal. Restatement of Agency 2d, § 374 (2).

A similar problem exists with respect to plaintiff's breach of warranty claim. Plaintiff argues that a privity of contract is not required for a claim of breach of express warranty by a remote purchaser. While that may be true, in this circumstance where the pills were purchased in the name of plaintiff's wife, the court must consider who the "purchaser" really was. The fact that plaintiff paid the co-pay for the medication prescribed for his wife, and purchased under her insurance, does not create a warranty running to him. If such a claim exists, it would run to the "patient" for whom the prescription was written as the "purchaser".

Similarly with respect to plaintiff's General Business Law § 349 claim, since sufficient unrebutted evidence exists to establish that plaintiff was acting as his wife's agent in picking up the pills, and, under the law, he may obtain reimbursement for his co-pay from her, his injury is too remote to establish standing for a General Business Law claim. *See Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 208 (2004). If injury occurred, she, rather than he, would be the "injured" party, and, therefore, would have any available cause of action under the section.


Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment are granted and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 21, 2006

ENTER:



HON. RICHARD B. LOWE, III

FILED
FEB 24 2006
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