

Lopez v Munoz

2006 NY Slip Op 30861(U)

January 26, 2006

Supreme Court, New York County

Docket Number: 113211/2004

Judge: Rosalyn H. Richter

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-SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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LOPEZ, NANCY, and all other similarly situated,

Plaintiff,

-against-

MUNOZ, HAIME, HAIME MUNOZ, INC., HM
MANE SOLUTIONS, DUANE READE, INC.,
and JOHN DOES 1-10,

Defendants.

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HM MANE SOLUTIONS and DUANE READE, INC.

Third-Party Plaintiffs

-against-

ZOTOS INTERNATIONAL, INC.,

Third-Party Defendant

-----X
RICHTER, J.:

Plaintiff Nancy Lopez (“Lopez”) moves for class certification pursuant to CPLR § 901 on an action arising out of alleged injuries resulting from use of the hair straightening product, EasyStraight. Plaintiff sues defendants Haime Munoz, Haime Munoz, Inc., and HM Mane Solutions as designers, manufacturers and distributors of the product and Duane Reade, Inc. as seller and distributor. Defendants HM Mane Solutions and Duane Reade, Inc. filed a third party summons and complaint against third-party defendant Zotos International, Inc, which is alleged to be the manufacturer of the product EasyStraight. Defendants argue that the motion is untimely pursuant to CPLR § 902 and that plaintiff does not meet all of the requirements set forth in CPLR

§ 901.

According to the complaint and plaintiff's affidavit, on or around June 5, 2004, plaintiff bought EasyStraight at defendant Duane Reade based on the advertisement displayed on the product packaging, which allegedly states that the product would "straighten and defrizz" hair. Before using the product, plaintiff states that she consulted the instruction sheet and reviewed the video on the product's website three times. Then, plaintiff had her sister apply the product in accordance with the timing requirements. Plaintiff alleges that soon after the application, her hair began to break off and fall out to the extent that she could no longer go out in public without covering her hair. Plaintiff further alleges that her scalp became irritated and itched constantly and that these conditions continued up until the complaint was filed. Plaintiff contacted EasyStraight's customer service department and went to see defendant Munoz at his salon. Plaintiff states that Munoz promised to fix the damage and provided her with hair product but the proposed treatment did not repair the damage. On September 15, 2004, plaintiff filed a "putative class action" summons and complaint on behalf of herself and all others similarly situated for violations of General Business Law §§ 349 and 350, breach of implied warranty, and strict liability in tort seeking compensatory and punitive damages.

Class certification is denied as plaintiff's motion is untimely. CPLR § 902 states that plaintiff shall "within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." The filing deadline is mandatory. *See Shah v. Wilco Systems, Inc.*, 2005 WL 3547036 (1st Dept. 2005). Although plaintiff has not submitted an affidavit of service for the summons and complaint, filing occurred on September

15, 2004 and defendant's answer was served on December 2, 2004. Based on these dates, it is undisputed that the sixty day time limit had long expired when plaintiff made her motion for class certification in August 2005.

Plaintiff argues that the Court, in its discretion, should grant the class certification motion even though it is late because of the interests of potential class members who may be prejudiced by barring class certification. However, plaintiff has failed to support this request. Plaintiff does not identify any specific individuals who want to join this class and does not explain why they motion was not made within the required period. Although plaintiff argues in the motion papers that defendant Haime Munoz has not responded to discovery requests, if this was a barrier to the motion, plaintiff should have sought an extension of time to move for certification rather than disregarding the time limit. Plaintiff also could have sought court intervention within the required time frame by moving to compel such disclosure but did not do so. Having ignored the statutory time frame, plaintiff cannot now seek class certification.

In any event, in determining whether to grant class certification, plaintiff must meet all five prerequisites set forth in CPLR § 901: "(1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class which predominate over questions affecting only individual members; (3) the claims of the representative party are typical of those of the class; (4) the representative party will fairly and adequately protect the interests of the class; (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Plaintiff fails to meet the first requirement of numerosity as she has failed to demonstrate by competent and admissible evidence that the purported class exists. *Feder v. Staten Island*

Hospital, 304 A.D.2d 470 (1st Dept. 2003). Plaintiff argues that the class size is “at least over 40 and is, in all likelihood, well over 100,” however, this assertion is based solely on information plaintiff has obtained from two internet sites. Plaintiff submits copies of an internet poll conducted on a website called “MisterPoll,” and from another web-site called “Review Center.” The potential class members that plaintiff presents are only identified by “username.” The participants on these sites on whom plaintiff now seeks to rely are not identified by their real names, but only by whatever web name they create. Plaintiff has failed to specifically identify one other product user by his or her actual name and address. Also, not one submission is supported by an affidavit from these individuals. Plaintiff improperly assumes that all of the contributors on the web-site are different individuals, which cannot be verified without knowing their actual identities. Plaintiff also provides a copy of a New York Post article by Sarah Hooper, editorial assistant at CosmoGirl, which states that she used the product and suffered damage to her hair. However, plaintiff does not provide an affidavit from Ms. Hooper who easily could be joined as an individual plaintiff in this litigation. As plaintiff has failed to specifically identify any other member of the class, the Court is unable to determine whether plaintiff’s claim is typical (CPLR § 901(a)(3)) and whether plaintiff will fairly and adequately protect the interests of the class (CPLR § 901(a)(4)).

Plaintiff also fails to show that common issues of law and fact predominate. Plaintiff seeks relief under four causes of action: (1) a declaration that the marketing EasyStraight is in violation of General Business Law §§ 349 and 350; (2) strict liability in tort alleging that EasyStraight is not fit for its intended use and is defective and unreasonably dangerous because it required professional handling and knowledge of chemicals; (3) breach of implied warranties

alleging that plaintiff relied on defendants to provide a product for straightening and implied that the product will be suitable for plaintiff's purposes; (4) and violations of General Business Law §§ 349 and 350.

General Business Law §§ 349 and 350 concern deceptive acts or practices in the conduct of any business and false advertising. Plaintiff alleges that defendants "heavily promoted" the product in major women's magazines and on the internet at www.easystraight.com as an "excellent hair product which straightened hair and removed 'frizziness.'" Plaintiff provides a copy of the alleged advertising from the EasyStraight web-site and a copy of the "print advertising" used by defendants, however, plaintiff does not state which magazine, if any, this printed advertising was taken from. Furthermore, plaintiff states that she bought the product based on the advertising displayed on the actual product packaging, which has not been provided. Class certification for purposes of an action under GBL §§ 349 and 350 may be appropriate where the "plaintiffs allege that all members of the class were exposed to the same misrepresentation," however, "...class certification is not appropriate where the 'plaintiffs do not point to any specific public pronouncement...which was undoubtedly seen by all class members.'" *Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49 (1st Dept. 2004). Here, plaintiff has failed to show that all of the alleged class members saw the same advertisement or were deceived by the same alleged misrepresentations in the product announcements. Furthermore, sections 349 and 350 require that the transaction occur in New York and plaintiff does not claim that these unidentified website users obtained their product in New York or show that they could be subject to the personal jurisdiction of New York. *See Simon v. Cunard Line Limited*, 75 A.D.2d 283 (1st Dept. 1980).

Plaintiff did not satisfy the requirement that common issues of fact or law predominate for the other causes of action of breach of implied warranty and strict liability in tort. These causes of action require the resolution of the issue of causation for each member of the class, and since the alleged product users have not been identified, the Court cannot make the determination that common issues will predominate. *See Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356 (2nd Dept. 2003).

In conclusion, plaintiff's motion for class certification is denied. A preliminary conference is scheduled for March 1, 2006 at 10am in Part 24, Room 418 at 60 Centre Street.

January 26, 2006



Justice Rosalyn Richter

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