

Michelle Farmer, Inc. v R. Gems, Inc.

2010 NY Slip Op 31907(U)

July 2, 2010

Supreme Court, New York County

Docket Number: 600922/08

Judge: Eileen Bransten

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

PRESENT: Bransten
HON. EILEEN BRANSTEN Justice

PART 3m

Michelle Farmer, Inc.

INDEX NO. 600922/08

MOTION DATE 11/23/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Z. Gems, Inc., et al

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED

JUL 06 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

JUL 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-2-10

Eileen Bransten

HON. EILEEN BRANSTEN

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, PART THREE

-----X

MICHELLE FARMER, INC.,

Plaintiff,

-against-

Index No.: 600922/08

Mtn. Date: 11/23/09

Mtn. Seq. No.: 004

R. GEMS, INC., P. GEMS CORP.
and MICHAEL REITH,

Defendants.

-----X

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Plaintiff Michelle Farmer, Inc. (“Plaintiff”) seeks leave to file a third amended complaint. Defendants R. Gems, Inc., P. Gems Corp. and Michael Reith¹ (“Defendants”) oppose the motion.

BACKGROUND

On October 1, 2004, Plaintiff and Defendants entered into an agreement (the “Agreement”), under which Defendants would sell to Plaintiff semi-precious gems, including blue topaz, citrine, peridot and green amethyst (the “Stones”) (Second Amended Compl at ¶ 8).

¹ Defendant Maykel Rieth is mispelled as Michael Reith (Affirmation of Marc A. Lebowitz, Esq. at ¶ 1).

Plaintiff paid Defendants for the Stones under the belief that the Stones were semi-precious gems (*id.* at ¶ 9). Plaintiff sold the Stones to its customers under the belief that the Stones were semi-precious gems and not synthetic stones (*id.*).

Plaintiff contends that Defendants breached the Agreement and delivered “imitation stones,” “synthetic stones” and “simulated stones” which were of inferior quality (*id.* at ¶ 10).

Plaintiff commenced this action, asserting causes of action sounding in breach of contract (first), of the implied warranty of merchantability (second) and of the implied warranty of fitness for particular purpose (third); violation of General Business Law (“GBL”) § 392 (fourth); and false misrepresentation/fraud (fifth).

Plaintiff now seeks to add a cause of action for violations under GBL §§ 349, 350 and 350-a, and to add an additional defendant, Euretes Rieth.

ANALYSIS

Pursuant to CPLR 3025 (b), “[a] party may amend his pleading . . . at any time by leave of court . . . Leave shall be freely given upon such terms as may be just.” “CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v Greater New York Mut. Ins. Co.*, 271 AD2d 278, 280 [1st Dept 2000]). However, leave to amend a pleading must be denied where the proposed amendment is plainly lacking

in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v Zucker*, 190 AD2d 636 [1st Dept 1993]).

I. Amendment to add a sixth cause of action under the General Business Law

GBL § 349 (a) provides that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”

GBL § 350 provides that “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”

GBL § 350-a defines “false advertising” to mean “advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect.”

Defendants argue that Plaintiff offers no facts to support the amendments.

“A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act” (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]).

Plaintiff sufficiently alleges the second and third elements. As a basis of Plaintiff’s proposed new cause of action under GBL §§ 349, 350 and 350-a, Plaintiff alleges that

Defendants made false statements, both orally and in advertisements (Proposed Third Amended Compl at ¶¶ 9, 15, 18). Plaintiff further alleges that it was damaged by Defendants' failure to properly label the Stones as synthetic or imitation and the Defendants' failure to advise Plaintiff that the Stones were synthetic or imitation constitutes violations under the GBL (*see id.* at ¶¶ 47-53).

Defendants argue that Plaintiff fails to allege that Defendants' conduct was consumer-oriented. Defendants urge that the term consumer-oriented refers only to "those who purchase goods and services for personal, family or household use" (*see Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000] [the term "consumer" does not encompass small businesses which purchase a widely sold service that can *only* be used by businesses] [emphasis added]). Disputes that are unique to the parties do not fall within GBL § 349 (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 26 [1995]).

However, the focus of GBL § 349 on "consumer orientation does not preclude its application to disputes between businesses per se, but it does severely limit it" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000]). Although the statute is, at its core, a consumer protection device, "corporate competitors now have standing to bring a claim under this [statute] . . . so long as some harm to the public at large is at issue"

(*Securitron Magnalock Corp. v Schnabolk*, 65 F3d 256, 264 [2d Cir 1995] [“It is clear that the gravamen of the complaint must be consumer injury or harm to the public interest”]).

Here, Defendants fail to demonstrate that from the allegations in the proposed amended complaint, it cannot be inferred that Defendants’ “practice has a broader impact on the consumer at large” (*see Sheth*, 273 AD2d at 73 [requirement that the challenged conduct be “consumer-oriented” could not be inferred from the allegations in the complaint]).

Additionally, Defendants maintain that Plaintiff’s claims fail under GBL §§ 350 and 350-a because Plaintiff does not allege a false advertisement in the proposed third amended complaint.

Plaintiff asserts that Defendants advertise that they sell semi-precious jewelry including sapphires, rubies, opals, topaz, tourmaline and citrine, without any indication that any of the “gems” are synthetic or glass (*see Affirmation by Plaintiff’s Attorney Steven B. Sarshik at ¶¶ 30, 35*).

“On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, __ AD3d __, __, 2010 NY Slip Op 4867, *1 [1st Dept 2010] [citations omitted]).

Despite the dearth of allegations, it may be inferred from the allegations in the complaint and the supporting affidavits that Defendants engaged in deceptive acts and/or false advertising as defined under GBL §§ 349, 350 and 350-a.

Accordingly, leave to amend by adding this cause of action is granted.

II. Amendment to add an additional individual defendant

Plaintiff seeks to add to the complaint allegations to the effect that Euretes Rieth “sold to retailers and consumers false and synthetic stones alleging that said stones were semi-precious gems” (Proposed Amended Compl at ¶ 18). Euretes Rieth is the sole member of R. Gems Inc. Based on the new allegations, Plaintiff seeks to pierce the corporate veil and hold Euretes Rieth personally liable for the actions of R. Gems Inc.

To pierce the corporate veil, a plaintiff bears “a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences” (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005], quoting *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). A plaintiff need not plead or prove actual fraud in order to pierce the corporate veil, but must allege that the individual defendant’s control of the corporate defendant was used to perpetrate a wrongful or unjust

act toward plaintiff (*Lederer v King*, 214 AD2d 354, 354 [1st Dept 1995]; see *TNS Holdings*, 92 NY2d at 339).

Plaintiff alleges in the proposed third amended complaint that Euretes Rieth has been engaged in the business of selling and marketing gems for the past 9 years (Proposed Third Amended Compl at ¶ 17); has sold to retailers and consumers “false and synthetic stones alleging that said stones were semi-precious gems” (*id.* at ¶ 18); “sold merchandise and conducted transactions on her own behalf, and by utilizing the name “R. Gems, Inc.” (*id.* at ¶ 19); and “participated in the operation of said business on a day-to-day basis and was actively involved in its marketing and sales activities” (*id.*).

Accordingly, Plaintiff has sufficiently alleged wrongdoing by Euretes Rieth to justify piercing the corporate veil (*compare Trofien Steel & Constr. Inc. v Rybak*, 26 Misc 3d 1223[A], 2010 NY Slip Op 50235[U], *5 [Sup Ct, Kings County 2010] [leave to amend granted when plaintiff submitted support for its claim for fraud even though the complaint was “devoid of nonconclusory allegations regarding (the individual defendant’s) operation of (the corporate defendant) as his corporate alter-ego]; *Kelley v Vikse*, 7 Misc 3d 1011[A], 2004 NY Slip Op 51875[U], *2 [Sup Ct, Suffolk County 2004] [leave to amend granted where the import of the expanded allegations was that defendants deliberately underbid the job, were undercapitalized when they entered into the contract, failed to segregate plaintiffs’ payments, utilized the funds collected without regard to corporate obligations and for their

own personal use and undertook a course of conduct to insulate themselves from personal liability]; *with Triton Constr. Co., LLC v New Central Ave., LLC*, 26 Misc 3d 1223[A], 2010 NY Slip Op 30546[U], *3 [Sup Ct, Kings County 2010] [leave to amend denied where plaintiff merely alleged that defendants “made substantial payments” to plaintiff with personal funds, “evidenced intent” to “disregard the legal existence” of the company and thus assumed personal liability for the debts owed by the company]).

Accordingly, it is

ORDERED that Plaintiff’s motion for leave to file a third amended complaint is granted, and the third amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

This constitutes the Decision and Order of the Court.

New York, New York
 July 2, 2010

FILED
 JUL 07 2010
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ENTER



Hon. Eileen Bransten