

<b>Cruz v Colgate-Palmolive Co.</b>
2013 NY Slip Op 30887(U)
April 24, 2013
Supreme Court, Richmond County
Docket Number: 100443/10
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:100443/10  
Motion No.:003, 004**

**DAISY CRUZ,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**COLGATE-PALMOLIVE COMPANY,  
MS USA TRADING, INC., and  
5<sup>TH</sup> AVENUE BARGAIN,**

*Defendants*

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The following items were considered in the review of the following motion for summary judgment and cross-motion to strike the answer.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Memorandum of Law in Support</b>	<b>2</b>
<b>Notice of Cross-Motion and Affidavits Annexed</b>	<b>3</b>
<b>Affirmation in Opposition to Plaintiff's Cross-Motion</b>	<b>4</b>
<b>Reply Affirmation</b>	<b>5</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Colgate-Palmolive Company, ("Colgate") moves for an order granting it summary judgment dismissing the plaintiff's complaint. The plaintiff cross-moves to strike Colgate's answer for purported spoliation of evidence. Colgate's motion for summary judgment is granted. The plaintiff's cross-motion is denied.

**Facts**

This is an action to recover for damages allegedly sustained as a result of using tainted toxic toothpaste. The plaintiff testified that on or about March 15, 2007 she purchased three tubes of Colgate toothpaste on 5<sup>th</sup> Avenue in Brooklyn, New York. The plaintiff testified that all

three of the tubes were in Colgate packaging and that she always used “original” flavor. The plaintiff testified that she brushed her teeth approximately 2-3 times per day. She testified further that it took her approximately 2-3 weeks to finish the first tube of toothpaste. Moreover, it was her testimony that she began noticing “symptoms” of the purported tainted toothpaste when she first started using the product. She stated that “. . . I started feeling like pieces of skin, like skin in my mouth. I thought it was something else.”<sup>1</sup> During her deposition she indicated that the referenced skin was on the inside of her lip.<sup>2</sup> After the symptoms developed the plaintiff testified that she stopped using the first tube because she saw that people were having problems with that brand of toothpaste on television.<sup>3</sup>

Moreover, the following exchange took place during the deposition:

Q. How much of the three tubes of toothpaste that you had purchased at the 5<sup>th</sup> Avenue store, what percentage of either of the tubes had you used at the time that you stopped using it?

A. About a tube and a half is what I had used. Because the other tube and a half I brought to the lawyers for them to checkout. I don't know if they did or not.

Q. What do you mean the other tube and half?

A. The new tube that was left and half of the tube that I had already used.

Q. What about the tube that you had fully used?

A. I had used it. It was in the garbage already.<sup>4</sup>

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<sup>1</sup> Cruz Transcript p. 16.

<sup>2</sup> Id. at 17.

<sup>3</sup> Id. at 26.

<sup>4</sup> Id. at 28.

Plaintiff then sought treatment from a dentist, Dr. Medrano, approximately 3-4 months after the first appearance of the symptoms. Dr. Medrano referred the plaintiff to a specialist whose name she could not recall. According to the plaintiff's testimony the specialist recommended that she use an over the counter rinse, but did not tell her what he believed caused her symptoms. Finally, the plaintiff saw a general doctor in Puerto Rico, Dr. Gil Kelly Torres Lugo who performed blood work. The blood work resulted in a diagnoses that she had Herpes 3. Dr. Lugo did not give her a diagnoses as to what was causing the symptoms in her mouth, or what caused the Herpes 3. Dr. Lugo prescribed medication for the Herpes 3, but plaintiff did not fill it due to the cost.

On April 7, 2011 at the direction of defendant's attorneys, a representative from Stericycle, retrieved a sample of the toothpaste from the remaining used toothpaste tube. Bill Cook, the worldwide director for global quality in the oral care, testified that Colgate received the sample in question. He testified that the toothpaste was in a bag and consequently he directed that the sample not be tested. Mr. Cook testified that Colgate does not test ". . . anything outside of the original container."<sup>5</sup> Moreover, by photographs taken of the tubes and boxes of the subject toothpaste, a packaging engineer employed by Colgate was able to confirm that all three tubes of toothpaste were authentic.

Based on the record before the court, it does not appear that the plaintiff had any of the toothpaste tested prior to commencing this action.

In addition to Mr. Cook, Colgate produced Walter Drabik who is employed by it and is responsible for packaging for North America. Mr. Drabik testified that in October of 2011 one of the toothpaste tubes did not contain enough toothpaste to take an adequate sample.

On July 11, 2012 the plaintiff submitted to a an oral examination conducted by Leslie W.

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<sup>5</sup> Cook Transcript p. 39.

Seldin, D.D.S. After examination, Dr. Seldin found that the plaintiff exhibited “. . . no evidence of carious lesions, structural defects or pathology of any type.” Moreover, Dr. Seldin concluded that “. . . it is clear from my examination that the physical nature of her [plaintiff] complaints appear unjustified and there is no confirmation of her reports of ongoing clinical symptomatology.”

In their cross-motion the plaintiff alleges that the Colgate disposed of the samples that were in its possession. But opposition papers submitted by Colgate demonstrate that the defendant notified the plaintiff that the law firm of Ahmuty, Demers & McManus had it in its possession. By letter dated July 24, 2012 Thomas J. Colameo, Esq. informed the plaintiff that they could make arrangements to have the sample returned.

### Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.<sup>6</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>7</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>8</sup> On a motion for summary

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<sup>6</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>7</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>8</sup> *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.<sup>9</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>10</sup>

A product liability action based in negligence requires that a showing that, “. . . a manufacturer was responsible for a defect that caused injury, and that the manufacturer could have foreseen the injury.”<sup>11</sup> Here, the plaintiff has offered no evidence that the toothpaste in question had any defect. While the plaintiff cross-moves to strike Colgate’s answer for failing to return the originally collected toothpaste sample, Colgate demonstrated that the same was available to be returned by letter dated July 24, 2012. Moreover, the toothpaste had been in the possession of the plaintiff at least during the year prior to the April 7, 2011 original sample collection date. In that time it does not appear that the plaintiff conducted any tests to determine if the toothpaste was toxic as it is alleged in this action. Furthermore, this matter was certified as trial ready on August 29, 2012; and the note of issue and certificate of readiness filed on September 9, 2012. The issue of spoliation was not raised until the plaintiff’s cross-motion dated February 6, 2013. To accuse Colgate of spoliation of critical evidence is disingenuous. Consequently, the plaintiff did not demonstrate that the toothpaste was harmful and the cause of action sounding in negligence must be dismissed.

The same is true for a cause of action under a theory of strict liability. “A cause of action in strict products liability lies where a manufacturer places on the market a product which has a defect that causes injury . . . [and] a defect in a product may consist of one of three elements: mistake in manufacturing, improper design, or by the inadequacy or absence of warnings for the

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<sup>9</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

<sup>10</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

<sup>11</sup> *Robinson v. Reed-Prentice Div. Of Package Mach. Co.*, 49 NY2d 471 [1980].

use of the product.”<sup>12</sup> Here, the plaintiff has not come forward with any evidence to support any of the aforementioned elements. Consequently, the causes of action alleging strict liability and manufacturing defects must also be dismissed. Moreover, plaintiff’s allegation that the toothpaste in question breached the implied warranty of merchantability, must also be dismissed. “For goods to be of merchantable quality they need to be reasonably fit for their intended purpose; they need not, however, be perfect.”<sup>13</sup> The plaintiff has not come forward with any evidence that the toothpaste in question contained any defect, or caused any damage to the plaintiff.

The plaintiff fails to raise any issue of fact that would require a trial. Consequently, Colgate is entitled to judgment dismissing the complaint as a matter of law.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment dismissing the plaintiff’s complaint made by Colgate-Palmolive Company is granted; and the complaint is hereby severed and dismissed as against it; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that this matter may proceed to inquest against the defaulting party MS Trading, Inc., upon the application of the plaintiff.

ENTER,

DATED: April 24, 2013

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>12</sup> Id.

<sup>13</sup> *Saratoga Spa & Bath, Inc. v. Beeche Systems Corp.*, 230 AD2d 326 [3<sup>rd</sup> Dep’t. 1997].