SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL E. HUFF Justice PART 32

Index Number : 153742/2012
WEESE, TORRIE
vs
PFIZER
Sequence Number : 002
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this [redacted]

Motion is decided in accord
th accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: OCT 08 2013

_____, J.S.C.
CAROL E. HUFF

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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TORRIE WEESE, individually and as Natural Parent and Guardian of MISTY JO WEESE, a Minor, : Index No. 153742/12

Plaintiffs, :

- against - :

PFIZER, INC., :

Defendant. :

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CAROL E. HUFF, J.:

In this product liability action, plaintiffs move, pursuant to CPLR 3211(b), to dismiss the twenty-eighth affirmative defense of defendant Pfizer, Inc., which states: "Pfizer specifically denies all allegations of duty, breach, negligence, defect, causation, and all forms of damages and demands strict proof thereof." Pfizer cross moves to dismiss the complaint.

Plaintiff Torrie Weese, during her pregnancy, was prescribed and took sertraline, a generic form of the anti-depressant Zoloft. Plaintiffs allege that the sertraline caused plaintiff Misty Jo Weese to be born with serious heart defects. Zoloft is manufactured by Pfizer; sertraline is not. Plaintiff contends that because federal law requires the generic medication to display the same warning label as the original medication, Pfizer owed a duty to plaintiffs that it breached by issuing an allegedly inadequate warning label with its original product.

> A brand-name manufacturer seeking new drug approval is responsible for the accuracy and adequacy of its label. See, e.g., 21 U.S.C. §§ 355(b)(1), (d); Wyeth v Levine, 555 U.S. 555, at 570–571 (2009). A manufacturer seeking generic drug approval, on the other hand, is responsible for ensuring that its warning label is the same as the brand name's. See, e.g., 21 U.S.C. § 355(j)(2)(A)(v); §

355(j)(4)(G); 21 CFR §§ 314.94(a)(8), 314.127(a)(7).

Pliva, Inc. v Mensing, 131 S Ct 2567, 2574 (2011).

The issue presented – whether a drug manufacturer that did not manufacture the product alleged to have caused injury owes a duty to a plaintiff because of the required identity of warning labels – has not been addressed by New York State courts.

> [A] duty of reasonable care owed by the tort-feasor to the plaintiff is elemental to any recovery in negligence. Foreseeability of injury does not determine the existence of duty. Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts.

Eiseman v State of New York, 70 NY2d 175, 187 (1987) (citations omitted).

In seeking to establish a duty in this context, plaintiff cites examples of purportedly analogous cases, including most notably Palka v Servicemaster Mgt. Corp., 83 NY2d 579 (1994); Sage v Fairchild-Swearingen Corp., 70 NY2d 579 (1987); and Weigand v Univ. Hosp. of New York Univ. Med. Ctr., 172 Misc2d 716 (Sup Ct NY County 1997).

In Palka, the plaintiff nurse was injured when a mounted wall fan fell on her while she worked in a hospital. She sued the defendant company that had contracted with the hospital to manage, among other things, the maintenance department. In Sage, the plaintiff injured her finger while working in an aircraft manufactured by the defendant. Her finger got caught on a hook attached to the doorway of the cargo compartment. Sometime prior to the accident, the hook had been replaced with a copy made by an employee of the airline, which was not related to the defendant manufacturer. In Weigand, the plaintiff underwent a blood transfusion during surgery and received blood contaminated with HIV. He sued, among others, the blood banking industry's national trade association, contending that it negligently established inadequate blood

collection standards. The courts in each of these cases found that defendants had had a duty with respect to the plaintiffs.

In each of these cases, as in the instant case, there was no direct connection between the defendants, the object that caused harm, and the plaintiff. However, unlike here, in each case the defendant intentionally took actions that affected the specific outcome. In Palka, the defendant took on the responsibility of ensuring a safe work environment when it contracted with the hospital to manage the maintenance department. In Sage, the defendant manufactured and sold the entire aircraft, and only a minor part was replaced with an identical part. In Weigand, the defendant undertook the role of regulating the quality of blood to be transfused. The volitional actions of each of these defendants was key in imposing a duty on them.

In the product liability context, the Sage court stated that imposition of strict liability is justified when a seller, "by marketing his product, has undertaken a special responsibility toward members of the consuming public who may be injured by it. The public has a right to expect that sellers will stand behind their goods. Thus, the burden of accidental injuries caused by products intended for consumption has been placed upon those who market them. . . ." Sage, supra, at 585 (emphasis added).

In this case, Pfizer had no intentional role in placing the specific product with the plaintiff. It was not the seller. Indeed, a third party – a competitor – manufactured and sold the product. The connection defendant seeks to establish through the warning label is even more attenuated. The label existed as a requirement of another third party, the federal government, aimed at the generic manufacturer. It is to be expected that Pfizer has a duty in connection with its own products and labels. However, that duty should not extend to products and labeling over

which it has no control, even if those products and labels mirror its own, because it has done nothing toward putting them in the hands of consumers.

Plaintiff has failed to demonstrate that precedent exists to extend a duty to defendant in this context. Accordingly, it is

ORDERED that plaintiffs' motion to dismiss defendant's twenty-eighth affirmative defense is denied; and it is further

ORDERED that defendant's cross motion to dismiss the complaint is granted.

Dated: OCT 08 2013

CAROL E. HUFF
J.S.C.