Egan v Telomerase Activation Sciences, Inc.
2014 NY Slip Op 32416(U)
September 5, 2014
Sup Ct, NY County
Docket Number: 652533/2012
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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BRIAN T. EGAN and ED MURRAY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

TELOMERASE ACTIVATION SCIENCES, INC., and NOEL THOMAS PATTON,

Defendants.

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Index No. 652533/2012
Motion Date: 8/28/2014
Motion Seq. No.: 005

BRANSTEN, J.

In motion sequence number 005, Plaintiffs Brian T. Egan and Ed Murray seek reargument of this Court's denial of their motion for class certification. Plaintiffs contend that this Court's previous decision, denying the motion on timeliness grounds, was in error because the Court overlooked the parties' compliance conference orders extending Plaintiffs' time to make the class certification motion. Notwithstanding the fact that the compliance conference orders were neither submitted to the Court with the motion nor referred to by either party in its papers, the Court will reconsider its previous ruling. Upon reconsideration, however, Plaintiffs' class certification motion is denied on other grounds.

I. Background

The instant litigation is a putative class action, asserting deceptive acts and practices in the marketing of TA-65, a nutraceutical dietary supplement promoted for the treatment of aging. Plaintiffs allege that they purchased TA-65 and bring General Business Law § 389 claims on behalf of themselves and others against Defendant Telomerase Activation Sciences, Inc. ("TA Sciences"), the company that produces TA-65, and its chairman, Defendant Patton.[1] In their Complaint, Plaintiffs allege that Defendants deceptively promoted TA-65 as a "containing safe ingredients to combat the effects of aging, improve cell longevity, health and quality of life." (Compl. ¶ 2.) Further, but for Defendants' purportedly deceptive business practices, Plaintiffs maintain that they could have purchased other supplements, comprised of another ingredient – astragalus – at a fraction of the price. *Id.* ¶ 94.

II. Analysis

Plaintiffs now seek certification of their proposed class, defined in the Complaint as "[a]ll persons, who during the relevant period of time, purchased, received and/or consumed from Defendants, in the State of New York, TA-65®MD or TA65®." (Compl.

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[1] The Complaint also asserted the same deceptive practices claims against Joseph Raffaele, M.D.; however, pursuant to a Stipulation of Discontinuance filed on December 10, 2012, the claims against Raffaele have been dismissed.

¶ 72.) Defendants oppose, arguing that Plaintiff has failed to satisfy any of the statutory requirements for certification.

A. *Class Certification Standard*

In order to obtain class certification, the five prerequisites set forth in CPLR § 901(a) must be satisfied: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class (adequacy); and, (5) a class action represents the superior method of adjudicating the controversy (superiority). *See Rabouin v. Metropolitan Life Ins. Co.*, 25 A.D.3d 349, 350 (1st Dep't 2006).

The party seeking class certification bears the burden of establishing the CPLR § 901(a) criteria. *CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D.3d 446, 447 (1st Dep't 2008). This burden must be met by providing an evidentiary basis for class certification. *See Matros Automated Elec. Const. Corp. v. Libman*, 37 A.D.3d 313, 313 (1st Dep't 2007).

The parties here dispute each of the Section 901(a) factors. While there are five required elements under Section 901(a), Plaintiffs' motion merits denial since they fail as to three of the required showings – numerosity, commonality, and superiority.

B. *Numerosity*

Under CPLR § 901(a)(1), the class must be so numerous that the joinder of all members as actual parties would be impracticable. There is no "bright-line test" governing this numerosity requirement. *See Weinstein v. Jenny Craig Operations, Inc.*, 41 MIsc.3d 1220(A) at *3 (Sup. Ct. N.Y. Cnty. 2013); *see also Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 96 (2d Dep't 1980) ("There is no 'mechanical test' to determine whether the first requirement – numerosity – has been met."); Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Law of N.Y., Book 7B, CPLR C901:4.

Here, Plaintiffs allege that the potential class numbers over 10,000 people, citing to the deposition testimony of TA Sciences consultant Weiman Liu. *See* Pls.' Moving Br.[2] at 22 (citing Affirmation of Steven Blau ("Blau Affirm.") Ex. B at 82:22-83:7). Liu

[2] Both parties submitted overlength briefs on this motion in clear violation of Commercial Division Rule 17, without first seeking leave from the Court. While the Court will consider all arguments raised by the parties in their briefs here, in the future, the Court places the parties on notice that any overlength submissions may be stricken.

testified that he "believed" that there were over 10,000 customers taking TA-65 and that this belief was not based on any documents he had seen regarding customer numbers but instead upon "revenue." (Blau Affirm. Ex. B at 82:22-83:7.)

Defendants do not challenge whether a class of 10,000 in and of itself satisfies the numerosity requirement. Instead, Defendants argue that Plaintiffs failed to provide evidence, aside from the statement of Mr. Liu, that any members of the proposed class, let alone 10,000, purchased TA-65 in New York State. The Court agrees.

Plaintiffs have failed to meet their burden to establish the evidentiary basis for satisfaction of the numerosity requirement. The Liu deposition testimony itself falls short of the mark. The only claim asserted by Plaintiffs is a violation of General Business Law § 349(a), which declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*." (emphasis added). To state a GBL § 349(a) claim, some part of the underlying transaction must occur in New York State and the New York action of a defendant cannot merely be "'hatching a scheme' or originating a marketing campaign in New York." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324-25 (2002).

The Liu testimony cited by Plaintiffs makes no reference to where the alleged 10,000 customers purchased TA-65. For the sake of this motion, in the absence of any evidence, the Court cannot assume, as Plaintiffs urge, that the purchases were made in

New York or that any portion of the transaction occurred in the state. Plaintiffs state in their brief, without citation, that "the [TA-65] sales transaction takes place in New York" and that "some, if not all, parts of [the purported class members'] purchase of TA-65 from TASI, were completed in New York." (Pls.' Reply Br. at 9-10.) For the purpose of class certification, such conclusory statements are not enough. *See Rallis v. City of N.Y.*, 3 A.D.3d 525, 526 (2d Dep't 2004) ("The plaintiffs had the burden of establishing compliance with the statutory requirements for class action certification under CPLR 901... [g]eneral or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden."); *see also Feder v. Staten Island Hosp.*, 304 A.D.2d 470, 471 (1st Dep't 2003) (deeming "[p]laintiffs' conclusory statement that they, as well as thousands of others similarly situated, were overcharged for copies of their medical records" to be "patently insufficient" to demonstrate satisfaction of CPLR § 901 elements).

Plaintiffs offer nothing, aside from the Liu deposition testimony, in support of the requisite numerosity showing. Accordingly, Plaintiffs motion fails as to numerosity because they did not provide an evidentiary basis for their class size claim.

C. *Commonality*

Even assuming *arguendo* that Plaintiffs satisfied the numerosity requirement for class certification, their motion nonetheless would fail on commonality grounds.

CPLR § 901(a)(2) requires that questions of law or fact common to the class predominate over any such questions affecting individual class members. Therefore, when individual factual questions as to individual class members predominate, courts have found commonality to be lacking. *See DeFilippo v. Mutual Life Ins. Co. of N.Y.*, 13 A.D.3d 178, 180 (1st Dep't 2004) (affirming denial of class certification on commonality grounds where GBL § 349 claim premised on representations made by life insurance salespeople "would require individualized inquiries into the conduct of defendants' sale agents with respect to each purchaser."); *see also CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D.3d 446, 447 (1st Dep't 2008).

Here, Plaintiffs have not satisfied their burden of demonstrating commonality. It is not enough that all class members purportedly purchased TA-65. "[T]he existence of a common issue does not by itself suffice to establish the predominance of issues common to the putative class necessary to justify a class action." *Gordon v. Ford Motor Co.*, 260 A.D.2d 164, 165 (1st Dep't 1999). Instead, questions as to individual class members' exposure to Defendants' allegedly deceptive representations regarding TA-65 predominate and require denial of Plaintiffs' motion.

To state a GBL § 349 claim, Plaintiffs must allege that Defendants engaged in an act or practice that is deceptive or misleading in a material way and that Plaintiffs have been injured by reason thereof. *Oswego Laborers' Local 214 Pension Fund v. Marine*

Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995). In the class action context, a Section 349 claim requires proof that "*each plaintiff* was reasonably deceived by the defendant's misrepresentations or omissions and was injured by reason thereof." *Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49, 52 (1st Dep't 2004) (emphasis added). Accordingly, with regard to a class action asserting a Section 349 claim, the First Department has held that "class certification is not appropriate where the plaintiffs do not point to any specific advertisement or public pronouncement by the defendants which was undoubtedly seen by all class members." *Id.* (internal citation omitted). While "reliance is not an element of a section 349 claim... [t]he plaintiff, however, must show that the defendant's material deceptive act caused the injury." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000).

Plaintiffs here fail to make this necessary showing. While Plaintiffs assert that Defendants made misleading statements, they make no showing of any misleading advertisement or public pronouncement by Defendants that was "undoubtedly seen by all class members." Thus, the instant case falls within the ambit of *Solomon v. Bell Atlantic Corp.*, in which the First Department decertified a class, deeming commonality lacking where "[p]laintiffs have not demonstrated that all members of the class saw the same advertisements." 9 A.D.3d 49, 53 (1st Dep't 2004). In *Solomon*, plaintiffs asserted, *inter alia*, Section 349 claims against a telecommunications provider, grounded in representations alleged made by the provider in the marketing of its digital subscriber line

("DSL") service. In support of their class certification motion, the *Solomon* plaintiffs submitted "a variety of advertisements in different media using varying language" regarding the DSL service. *Id.* at 53. The First Department concluded that this submission was insufficient, however, since plaintiffs failed to demonstrate that the class saw these advertisements. In fact, the *Solomon* plaintiffs' showing failed to address the fact that "some subscribers saw none of these advertisements but learned of DSL through word of mouth." *Id.* Likewise here, Plaintiffs point to no evidence demonstrating that members of the proposed class were exposed to the same misrepresentations allegedly made by Defendants TA Sciences and Patton. Indeed, Plaintiffs' briefing points to several different purportedly misleading representations but does not provide an evidentiary basis from which to conclude that potential class members saw these statements. *See* Blau Affirm. Exs. F & K. Therefore, in the absence of a clear showing as to whether such representations were seen by any, let alone all, members, "questions of individual members' exposure to the allegedly deceptive advertising predominate," requiring denial of Plaintiffs' motion. *Id.* at 53.

D. *Superiority*

The issue as to whether the purported 10,000 class members each were exposed to the alleged TA-65 misrepresentations – and if so, which particular misrepresentations –

potentially would necessitate individual inquiries, which "would render the litigation extremely difficult if not impossible to manage, and an inefficacious means of adjudicating any common underlying common issue." *Solomon*, 9 A.D.3d at 56. Thus, Plaintiffs' failure to demonstrate commonality likewise underscores that Plaintiffs have failed to demonstrate under CPLR § 901(a)(5) that a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

III. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' motion for class certification for failure to demonstrate the requisite elements of numerosity and commonality, as well as superiority. The Court has considered the parties' remaining arguments as to the Section 901 elements and finds them without merit.

Accordingly, it is

ORDERED that Plaintiffs Brian T. Egan and Ed Murray's motion for reargument of this Court's April 30, 2014 Decision and Order is granted; and it is further

ORDERED that upon reargument, Plaintiffs Brian T. Egan and Ed Murray's motion for class certification is denied; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 442, 60 Centre Street, on October 14, 2014, at 10 AM.

Dated: New York, New York
September 5, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.