Short Form Order

PUBLISH

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

DULCETTE TECHNOLOGIES, LLC

Plaintiff,

-against-

MTC INDUSTRIES, INC., and UNICHEM ENTERPRISES, INC.,

Defendants.

x----------x

INDEX NO.:60071/2013

SEQ. NO.:004-MD
005-XMD

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Upon the following e-filed papers numbered 55 to 77 read on this motion to Amend Pleadings and Cross Motion for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 55 - 59; Notice of Cross Motion and supporting papers 60 - 70; Answering Affidavits and supporting papers 72-75; Replying Affidavits and supporting papers 76 - 77; Other 0; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that Plaintiff's motion seeking leave to amend the pleadings is denied; and it is further

ORDERED that Defendants' cross motion seeking summary judgment in their favor is denied; and it is further

ORDERED that counsel and clients are directed to appear for a trial scheduling conference on **November 2, 2016, at 9:30 a.m.**

In this tort action, Plaintiff, a reseller of pharmaceutical products, alleges that in 2012, Defendant MTC Industries, Inc. (hereafter referred to as "MTC") provided sucralose, also known as "Splenda," which was allegedly determined to be of substandard quality, causing damage to Plaintiff. Although Plaintiff had only previously obtained sucralose from an

Indian company named Camlin, the product was in short supply and Plaintiff had to look elsewhere to supply its customer, nonparty Raritan Pharmaceuticals ("Raritan"). Plaintiff was contacted by Defendant MTC, who does business with companies in China, and began supplying Plaintiff with the product in 2008. Plaintiff alleges that it made it clear purity was of the utmost importance and must be in accord with United States Food Chemical Codex (hereafter referred to as "FCC") specification as required by the Food and Drug Administration, which requires a purity of 98%. Plaintiff also alleges that it paid a premium to ensure that the sucralose provided was from JK Sucralose, a known and reliable Chinese producer, or from other approved suppliers. However, the record reveals that, sometime in 2012, MTC obtained the sucralose from another company, ZMC. Four of the drums containing sucralose which MTC obtained from ZMC were sent to Plaintiff. Plaintiff resold the product to its customer, Raritan, and appeared contaminated upon being opened by Raritan. The drums were returned to Plaintiff by Raritan. Upon testing, at least one of the drums of sucralose was badly contaminated and was only 96% pure and not in conformity with the analysis provided by MTC. As a result, Plaintiff lost Raritan as a customer and suffered severe injury to its reputation in the industry. This action was commenced on March 21, 2013.

The complaint alleges eight causes of action. The first four causes of action seek damages against Defendant Unichem Enterprises, Inc., whose motion to dismiss was granted by Order, dated September 24, 2013. The complaint alleges the remaining four causes of action as against MTC: breach of express warranty per UCC § 2-313; breach of implied warranty of merchantability per UCC § 2-314; breach of implied warranty of fitness for a particular purpose per UCC § 2-315; and fraud.

Plaintiff now moves to amend the complaint to add Jimmy Wang, President of MTC as a Defendant for fraud, and seeks compensatory, incidental, consequential and punitive damages. Defendant MTC cross-moves for summary judgment dismissing the complaint.

In support of its motion, Plaintiff submits a copy of Mr. Wang's deposition transcript, and a proposed amended complaint. Plaintiff's counsel affirms that Mr. Wang admitted that MTC did not simply copy results from its supplier's certificate of analysis, but actually changed the results. At his deposition, Mr. Wang stated that he is the Chief Executive Officer and Chief Scientist of MTC. Mr. Wang is in charge of MTC's Quality Control Department. Mr. Wang also states that MTC imported sucralose from Zhejiang Medical Company (hereafter referred to as "ZMC"), in China, for resale to Plaintiff. Prior to the sale, MTC provided five kilograms to Plaintiff for sampling and testing. Within seven months, Mr. Wang stated that Plaintiff approved of the sample and issued a purchase order with the sales department. Mr. Wang stated that MTC sold sucralose to Plaintiff during the time period in question. The delivery of sucralose came from ZMC, and, although MTC received

certificates of analysis which were prepared by Shanghai Institute of Quality Inspection and Technical Research. MTC did not test the product prior to shipping it to Plaintiff, and completely trusted the Shanghai Institute's testing, as it was a government-controlled laboratory in China. Mr. Wang testified that the employees of the Quality Control Department, of whom he was in charge, copied the Shanghai Institute's analysis onto MTC's own report and added additional values which were not reflected on the Shanghai Institute's report. Mr. Wang stated that he did not know why certain values were not identical to those in the Shanghai Institute's report, but that it must have been a typographical error or that the employee may have rounded up the numbers. In any event, he testified that the values were still within the normal ranges. The Shanghai Institutes tested the product at 99.38%, while MTC's report revealed that the purity of the product was 99.8%. Mr. Wang stated that Plaintiff never contacted MTC regarding the alleged contamination and MTC was unable to test the returned product.

The proposed amended complaint reveals that the allegations asserted as against Unichem were deleted, the allegations asserted as against MTC remained and a new cause of action against Mr. Wang was inserted, alleging fraud.

In opposition, and in support of their cross motion for summary judgment, Defendants assert that Plaintiff failed to clearly show the changes made to the pleadings as required by the statute. Defendants further argue that Plaintiff cannot demonstrate Mr. Wang's alleged misrepresentation is the cause of Plaintiff's damage, and that the alleged contaminated sucralose was supplied by MTC. Defendants also argue that an amendment to the pleadings would cause prejudice to Defendants, in that Defendants would be solely liable for the alleged contaminated sucralose since the causes of action alleged as against UniChem were dismissed only on the ground of *forum non conveniens*.

In reply, Plaintiff showed the deletions and changed in the original complaint and highlighted the new cause of action asserted as against Mr. Wang.

Motions for leave to amend pleadings should be freely given in the absence of prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or devoid of merit and free from doubt (***Goodleaf v Tzivos Hashem, Inc.***, 68 AD3d 817, 889 NYS2d 478 [2d Dept 2009]). Corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it (***Marine Midland Bank v John E. Russo Produce Co., Inc.***, 50 NY2d 31, 427 NYS2d 961 [1980]). Mere negligent failure to acquire knowledge of the falsehood is insufficient (***Id.***).

Plaintiff relies upon ***I. Towjer, Inc. v Tarran***, 236 AD2d 518, 654 NYS2d 626, 627 (2d Dept 1997), and ***Marine Midland Bank v John E. Russo Produce Co., Inc.***, *supra*, for the proposition that Mr. Wang is responsible for the MTC Quality Control Department's errors, and alleges, "...this falsification was performed by the MTC quality control department under the charge of Mr. Wang." In ***I Towjer, Inc.***, the court found that Tarran, who negotiated the underlying transaction which formed the basis of the action, must have personally participated in the misrepresentation. In Marine Midland Bank, the Court held that corporate defendants could be held liable for their awareness of and participation in check kiting. Defendants rely upon ***Ricca v Valenti***, 24 AD3d 647, 807 NYS2d 123 (2d Dept 2005) for the proposition that they would be substantially prejudiced, as stated above. Defendants also rely upon ***Staines v Nassau Queens Med. Group***, 176 AD2d 718, 574 NYS2d 800 (2d Dept 1991), which held that although as a general rule the legal sufficiency or merit of the proposed amendment is not examined on a motion to amend, the weight of authority provides that where a substantial question is raised as to the meritoriousness of a proposed amendment to a pleading, the court should resolve the question at the threshold in order to obviate the possibility of needless time-consuming litigation.

Here, Plaintiff's proposed amendment to the complaint is without merit. Upon review of Mr. Wang's deposition transcript, the Court finds that Mr. Wang stated that the quality control employees copied ZMC's analysis, was unsure how different values were reported in MTC's report, and stated frequently that he would have to ask his employees why certain values were misstated, since Wang did not perform that work. In any event, he stated that the values, however incorrectly transcribed onto MTC's report, were within normally accepted standards. Therefore, the Court concludes that Mr. Wang did not personally participate in the misrepresentation or have actual knowledge of it. What knowledge he did have does not rise to the level of fraud as set forth in the cited cases.

Turning to Defendants' cross motion for summary judgment, in support, Defendants assert that Plaintiff provides nothing but speculation that the alleged contaminated product return by Raritan was supplied by MTC. In addition, Defendants argue that Plaintiff failed to submit any proof that the contaminated sucralose was from MTC, and that the results from Certified Laboratories is not certified. Defendants submit, *inter alia*, the deposition transcript of Mr. Vin Nayak, PhD (herafter referred to as "Dr. Nayak"). Dr. Nayak testified to the effect that he is the president of Raritan Pharmaceuticals since 2002. He is involved in the day-to-day sales, marketing, purchasing of the business. The company manufactures several products that contain artificial sweeteners and sucralose is one of them. Dr. Nayak began ordering sucralose exclusively from Plaintiff sometime in 2011 until 2012. He saw some quality issues with the product and immediately stopped buying the product from

Plaintiff. The product was returned to Plaintiff. Dr. Nayak believed that the product was made by Camlin, in India, which was reflected on the labels on the containers.

In opposition to the cross motion, Plaintiff asserts that there is a question of fact as to whether the contaminated sucralose that Plaintiff sold to its customer Raritan was supplied to Plaintiff by MTC. Although MTC claims that the label on the contaminated sucralose drums show that the sucralose was manufactured by Camlin, the testimony by Dr. Nayak revealed that Camlin had stopped manufacturing the sucralose prior to the date of shipment. Plaintiff submits, *inter alia*, the deposition transcript of Melvin Blum, Plaintiff's president, who testified to the effect that he received a complaint from Raritan Pharmaceuticals in or about August 2012. Raritan returned the four drums to Plaintiff and a sample was sent to a local laboratory, Certified Laboratories, which revealed that the product did not meet the chemical code expectations. Mr. Blum contacted Defendants, however Defendants did not return his calls and never asked for a sample. All communications with MTC were oral and MTC refused to acknowledge that anything had taken place.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]). As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (***Mennerich v Esposito***, 4 AD3d 399, 400, 772 NYS2d 91 [2d Dept 2004] [and cases cited therein]). Here, Defendants' reliance on deficiencies in Plaintiff's proof is insufficient to establish their entitlement to judgment as a matter of law. In any event, there are issues of fact which preclude a finding of summary judgment in Defendants' favor.

Accordingly, Plaintiff's motion seeking leave to amend the pleadings is denied, and Defendants' cross motion seeking summary judgment is denied.

The parties are directed to appear for a trial scheduling conference on **November 2, 2016 with clients at 9:30 a.m.**

The foregoing constitutes the decision and Order of the Court.

DATED: OCTOBER 28, 2016
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.