

People v Khan

2017 NY Slip Op 30638(U)

April 3, 2017

Supreme Court, New York County

Docket Number: 451500/2016

Judge: Arlene P. Bluth

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

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THE PEOPLE OF THE STATE OF NEW YORK, by ERIC
SCHNEIDERMAN, Attorney General of the State of
New York,

Petitioner,

DECISION AND ORDER
Index No. 451500/2016

Motion Sequence: 001

-against-

NIAZ KHAN, PHILLIP PULCCA, AIDA GUACH, LISANKA
SANCHEZ, JOHN OR JANE DOE, DOING BUSINESS AS
LEGALHERBALBUD.COM

Respondents.

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The petition brought by petitioner pursuant to *inter alia* Executive Law § 63(12) is granted only to the extent that the website Legalherbalbud.com is permanently enjoined from continuing to conduct business of any kind. All other requests for relief are denied because petitioner failed to meet its burden of proof.

Background

Petitioner brings this special proceeding against respondents in connection with its allegations that respondents operated a website that sold synthetic marijuana.

Specifically, petitioner seeks an order 1) permanently enjoining Legalherbalbud and its principals, agents, trustees, servants, employees successors, heirs and assigns or any other person under its discretion and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which it may now or hereafter act or conduct

business, from offering for sale and/or selling mislabeled drugs in violation of the Agriculture & Markets Law § 194, 2) permanently enjoining Legalherbalbud from offering for sale and/or selling misbranded drugs in violation of Education Law §§ 6802 and 6815, 3) permanently enjoining Legalherbalbud from possessing drugs for the purpose of compounding, dispensing, retailing, wholesaling, or manufacturing or offering them for sale at retail or wholesale without being registered by the Education Department as a pharmacy, wholesaler, manufacturer or outsourcing facility in violation of Education Law § 6808, 4) permanently enjoining Legalherbalbud from engaging in the fraudulent, deceptive and illegal practices alleged in this verified petition, 5) permanently enjoining Niaz Khan, Phillip Pulcca, Aida Guach, Lisanka Sanchez, and John and/or Jane Doe from conducting business under a name other than their legal names without having filed a certificate of assumed name in the county where they conduct their business, 6) permanently enjoining website Legalherbalbud.com from continuing to conduct business of any kind, 7) directing Legalherbalbud comply with any and all state, local or federal labeling requirements, 8) directing Legalherbalbud to disgorge all profits resulting from the fraudulent and illegal practices alleged herein, 9) directed Legalherbalbud to prepare an accounting of all commodities it sold, or offered for sale, from January 1, 2013 to the date of the judgment of this Court including: [a] the name of the product, [b] the manufacturer and/or distributor of the product, [c] a description of the product [d] the retail price of the product, [e] the number of units of the product sold and [f] the names and contact information of its customers, 10) permanently enjoining Legalherbalbud from, directly or indirectly, destroying or disposing of any records pertaining to their business, 11) directing Legalherbalbud to notify petitioner of any change of address within five days of such change, 12) directing Legalherbalbud

to pay a civil penalty of \$5,000 for each deceptive act which violated General Business Law Article 22-A pursuant to General Business Law § 350-d, 13) awarding Petitioner additional costs of \$2,000 against Respondents pursuant to CPLR §8303(a)(6).

Petitioner argues that respondents used the website (Legalherbalbud.com) to sell these products without providing proper health warnings, directions for use, or manufacturer information. Petitioner maintains that respondents included directions “not to use for human consumption” on the packages of their products despite the fact that they intended to sell these items to consumers for consumption as synthetic marijuana.

Petitioner asserts that the owner, manager and registrant of the website was respondent Khan. Petitioner insists that its investigation confirms that Khan was the owner of the website.

Petitioner alleges that respondent Pulcca financed the company’s operations and that respondents Guach and Sanchez retrieved Western Union money transfers as payment for the website’s products.

Petitioner also insists it created a fictitious identity on the Legalherbalbud website and made four separate purchases of synthetic marijuana. Petitioner alleges that respondents’ website states it sells spice blends and K2 alternatives which are currently legal in all 50 states. Petitioner further alleges that respondents used Facebook and e-mail to advertise and promote their products.

Petitioner asserts seven causes of action against respondents including: false labeling, misbranding of drugs, failure to register, failure to file a certificate of an assumed name, fraud pursuant to Executive Law § 63(12), deceptive acts and practices and false advertising.

In opposition, respondent Sanchez denies petitioner's allegations. Respondent Khan specifically denies that he is a principal of Legalherbalbud, that he owns any piece of that entity (if it exists) and denies that he is a manager, owner or participant in Legalherbalbud. Respondent Khan further claims that he voluntarily spoke with the Attorney General's Office at a recorded meeting. Khan contends that he stated at this meeting that his only connection to Legalherbalbud is that a credit card under his control was used to purchase a website domain. Khan denies that this purchase establishes that he owned or managed Legalherbalbud.

In reply, petitioner contends that it is entitled to the relief requested in its petition because respondents have failed to raise issues of fact.

Respondent Pulcca filed his answer on February 6, 2017 despite the fact that this Court ordered that all answers had to be served and filed by January 11, 2017 (NYSCEF Doc. No. 40). Therefore, respondent Pulcca is in default and his answer will not be considered. Respondent Guach did not respond or appear. Accordingly, the allegations against her are undisputed.

Discussion

In a special proceeding brought pursuant to Article 4, "The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409[b]). The same standards of a summary judgment motion apply to proceedings brought pursuant to CPLR 409(b) (*Matter of Port of N.Y. Auth. v 62 Cortlandt St. Realty Co.*, 18 NY2d 250, 255 [1966]).

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*).

When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

In a special proceeding, if triable issues of fact exist, the Court must hold a hearing pursuant to CPLR 410.

As an initial matter, the Court observes that petitioner brings six (of seven) causes of action against all respondents, defined collectively as Legalherbalbud (hereinafter, "Legalherbalbud") in its petition (petition ¶ 1), even though the petition contains allegations that respondents had distinct and separate roles (*c.f.* petition ¶¶ 7-11). The petition fails to allege how each respondent is specifically liable for each of the seven causes action other than asserting that all respondents are liable. This tactic is problematic especially where petitioner clearly believes

that each respondent had different levels of responsibility. Simply creating a defined term for all respondents does not mean that petitioner is absolved of its responsibility to allege specific allegations with respect to each respondent. As explained in further detail below, the petition's vacillation between general and specific allegations prevents this Court from granting all of petitioner's requested relief.

Causes of Action Relating to All Respondents

The allegations relating to the undercover purchases of alleged synthetic marijuana, the advertising on the home page, the email advertisements and the Facebook page do not specify which respondent was involved in these allegedly illegal activities. Rather than alleging, for instance, that a particular respondent packaged or mislabeled the products, petitioner claims that Legalherbalbud, defined as all respondents, is liable for all causes of action except for the fourth cause of action (failure to file certificate of an assumed name). This renders petitioner's allegations vague and conclusory with respect to respondents Khan, Pulcca, Sanchez and Guach.

With respect to Khan, petitioner states that Khan purchased the website domain and is responsible for the operations of the business (petition ¶ 4). But the petition does not provide any evidence that Khan had anything to do with the six causes of action (1-3, 5-7) that petitioner alleges against Legalherbalbud. Petitioner must meet its burden to show what Khan's role was in false labeling, misbranding drugs, failing to register, fraud, deceptive acts and practices, and false advertising. Petitioner cannot simply conclude that Khan committed these acts without detailing exactly what he did. Lumping all respondents together does not satisfy petitioner's burden of proof.

This same analysis applies to Pulcca, Sanchez and Guach. Petitioner insists that Pulcca financed the operations at Legalherbalbud.com. Even if he did, that does not establish that he can be found liable for the six causes of action ascribed to all respondents generally. Providing money is not the same as mislabeling products or directing that someone else mislabel products. Petitioner needed to establish exactly what *Pulcca* did in order to meet its burden.

Guach and Sanchez were identified as people authorized to retrieve the Western Union payments (*see* petition, exh A). Once again, even if these allegations were true, that does not mean that Guach and Sanchez should be found liable for the six causes of action identified above.

Critically, for Pulcca, Sanchez and Guach, petitioner states that each “has *knowledge* of the fraudulent and illegal conduct, false advertising, and deceptive acts and practices alleged herein” (petition ¶¶ 8-10 [emphasis added]). Possessing *knowledge* of these activities does not mean that each of these respondents *affirmatively committed* such acts. It may make them good witnesses, but it does not make them liable in this proceeding. Accordingly, this Court is unable to find that petitioner met its burden to demonstrate that respondents were liable for causes of action 1-3 and 5-7.

The only other respondent is listed as “John Doe and/or Jane Doe d/b/a Legalherbalbud.com.” The petition characterizes this party as “Respondent John Doe and/or Jane Doe is an as yet unknown principal and integral component of Legalherbalbud.com insofar as he or she effectuated the acquisition, marketing, distribution, and other facilitation of illegal synthetic marijuana-styled designer drugs and received monetary compensations for his or her actions” (petition ¶ 11).

For some reason, petitioner did not identify the ‘principal’ and ‘integral’ component of Legalherbalbud.com and brought this proceeding against John or Jane Doe. Obviously, sometimes an investigation may not reveal every relevant detail. But the respondents in this proceeding cannot be held liable for the general actions of this website without more evidence concerning their specific roles with Legalherbalbud.com especially because petitioner itself states that John or Jane Doe is the actual mastermind. This Court will not impose a fine of up to \$600,000 on each respondent when petitioner has not met its burden. It might have been convenient for petitioner to allege that all respondents were liable for all the actions of Legalherbalbud, but that is not enough.

The Court also observes that in the cases petitioner attached as exhibits to the petition, the petitioners in those matters (also the Attorney General) identified specific people who were the principals of the businesses allegedly engaging in illegal practices, such as “John Tebetts III, d/b/a Tebb’s” (*see* petition, exhs P-Q). Here, the Court cannot make a finding against an unidentified John Doe and/or Jane Doe d/b/a Legalherbalbud.com or against respondents who were allegedly associated with the illegal business.

Failure to Register

The only cause of action that specifies the respondents in their individual capacities is the fourth cause of action for the failure to file a certificate of an assumed name. General Business Law § 130 requires a person who conducts or transacts business under a name other than his or her own to file a certificate that sets forth *inter alia* the name under which the person is conducting business. Petitioner alleges that each of the respondents, individually, is liable for failing to file such a certificate for doing business as Legalherbalbud.com.

However, this claim fails, just as the ones above, because petitioner did not demonstrate that each respondent was conducting or transacting business under a name other than their own. Sanchez and Guach are alleged to have been named as people authorized to pick up payments for products purchased from the website. Without more, that does not indicate that they were transacting or conducting business as Legalherbalbud.com. It simply means that the unidentified person referred to as 'Samantha' instructed the undercover investigator to name Guach and Sanchez on the wire transfers (*see e.g.*, petition, exh A ¶ 24, 42). It does not establish that Guach or Sanchez had a duty or responsibility to file a certificate.

The same analysis applies to Pulcca. Allegedly providing financing to this website does not mean Pulcca was required to file a certificate. And although Khan allegedly purchased the domain name, that does not mean he was conducting business as Legalherbalbud.com. Petitioner may believe that these respondents transacted and conducted business as Legalherbalbud.com, but petitioner did not submit enough evidence to establish that respondents should have filed a certificate.

Even had petitioner met its burden with respect to this cause of action, the Court observes that the penalty for knowingly failing to file a certificate is a misdemeanor (General Business Law § 130[9]). Petitioner failed to address this penalty in its extensive requests for relief. Obviously, the heightened burden of proof in a criminal matter and the fact that this proceeding was brought in the New York County Supreme Court- Civil Branch prevents this Court from granting petitioner relief with respect to this cause of action.

Summary

It is not this Court's role to interpret or to make assumptions about the allegations contained in a petition. The Court recognizes the potential public health crises that can result from the widespread use of synthetic marijuana (*see* petition, exh A-5) and has no interest in allowing people to make a profit by selling dangerous, mislabeled, and unregulated products. In this proceeding, it is undisputed that petitioner's investigator ordered products purporting to be synthetic marijuana from the Legalherbalbud website. Therefore, the petition is granted only to the extent that the website Legalherbalbud.com is permanently enjoined from continuing to conduct business of any kind.

But that does not mean that respondents Khan, Sanchez, Pulcca and Guach can be held liable. Petitioner has merely identified four people who, it claims, has some relationship to the website. But this Court will not impose a fine of \$600,000, individually or collectively, against respondents where petitioner has not submitted enough evidence to establish how respondent is at fault.

Accordingly, it is hereby

ORDERED that petitioner's petition for the relief requested above is granted only to the extent that the website Legalherbalbud.com is permanently enjoined from continuing to conduct business of any kind and all other requests for relief are denied.

This is the Decision and Order of the Court.

Dated: April 3, 2017
New York, New York



HON. ARLENE P. BLUTH, JSC