State of New York v FieldTurf USA Inc.
2019 NY Slip Op 31726(U)
June 20, 2019
Supreme Court, New York County
Docket Number: 100815/2017
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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THE STATE OF NEW YORK AND NEW YORK CITY, EX REL. KENNY GILMAN,

Plaintiff,

- v -

FIELDTURF USA INC. A FLORIDA CORPORATION, FIELDTURF, INC., A CANADIAN CORPORATION, TARKETT, INC., A CANADIAN CORPORATION, FIELDTURF TARKETT SAS, A FRENCH CORPORATION, JOHN DOE 1 -10

Defendants.

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INDEX NO. 100815/2017

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 28, 29, 31, 32
were read on this motion to/for DISMISS.

HON. BARRY R. OSTRAGER:

This action arises out of Defendants' alleged sale of defective artificial turf to the State of New York and the City of New York (collectively, the "Government"). Relator Kenny Gilman commenced this *qui tam* action pursuant to the New York False Claims Act ("NYFCA") and New York City False Claims Act ("NYCFCA") on behalf of the Government alleging that Defendants ("FieldTurf") knowingly sold defective artificial turf to the Government from 2006 to 2010. Relator seeks to recover damages and civil penalties under the NYFCA and NYCFCA arising from FieldTurf's purported presentation of false claims and records to the Government in connection with the Government's purchase of FieldTurf's artificial turf products which were installed at various public schools and parks in the State.

Presently pending before the Court is FieldTurf's motion to dismiss the complaint for failure to state a claim and as time-barred by the statute of limitations. For the reasons stated herein, the motion to dismiss is granted in part and denied in part.

Background

FieldTurf manufactures and installs artificial turf fields for use at parks and schools. Relator's father, John Gilman, was the founder of Defendant FieldTurf and served as its CEO until his death in July 2007. Relator Kenny Gilman allegedly worked for FieldTurf for nine years as a Senior Operations Executive and Executive Director until September 2008 when he was purportedly fired. During his tenure, Relator allegedly became concerned that FieldTurf's products were defective and were not living up to the company's marketing representations regarding the product's durability.

As early as February 2005, one of FieldTurf's products, Duraspine, showed a drastic decrease in durability during testing. By December 2005, FieldTurf was allegedly notified that the material used in its product was defective and lacked durability. FieldTurf's internal correspondence tends to show a concern among executives that its turf fields were failing less than a year after installation, and that such defects would expose FieldTurf to tens of millions of dollars in replacement costs. (*See* Complaint ¶¶ 41-43). By 2008, FieldTurf had submitted its first warranty claim to non-party TenCate—FieldTurf's supplier—for material in a defective Duraspine field. (*See* Complaint ¶ 52). Thus, Relator alleges that as early as 2005, and certainly by 2006, FieldTurf was well-aware that its Duraspine turf field was experiencing significant durability issues.

Relator alleges that, despite FieldTurf's knowledge of Duraspine's defects, the company continued to market the product as providing at least ten-years of life expectancy. (*See* Complaint ¶ 47). Relator alleges that the Government relied on FieldTurf's affirmative marketing representations that its fields would last ten years in deciding to purchase dozens of fields to be installed at public schools and parks throughout the State. Thus, Relator alleges that FieldTurf violated the NYCFCA

and NYFCA by fraudulently inducing the Government to purchase fields through material misrepresentations and omissions regarding the fields' durability.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87-88.

While fraud claims must be pled with particularity under the heightened pleading standard of CPLR § 3016, "the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a *reasonable indication* that one or more [NYFCA violations] are likely to have occurred...." N.Y. State Fin. Law § 192(1-a) (emphasis added). Thus, Relator need only allege facts that, if true, would reasonably indicate that FieldTurf likely violated the NYFCA at least once.

FieldTurf's motion to dismiss argues, primarily, that Relator fails to allege that the purported misrepresentations concerning Duraspine's durability were used in connection with any particular sale to any particular Government purchaser. Thus, FieldTurf asserts that Relator fails to allege that the Government relied on any specific misrepresentation in connection with a specific purchase of artificial turf, and further, that a conclusory allegation that the Government relied upon FieldTurf's marketing material is insufficient to state a claim.

In opposition, Relator asserts that he adequately alleges that the sales to the Government were brought about through FieldTurf's fraudulent sales literature and communications by FieldTurf agents misrepresenting the quality of Duraspine fields. (*See* Complaint ¶ 82). Further, Relator argues

that it is sufficient that FieldTurf omitted critical information regarding the fields' durability in connection with sales to the Government.

First, Relator's allegations regarding FieldTurf's affirmative misrepresentations are sufficiently pled under NYFCA's more lenient pleading standard which does not require a *qui tam* relator to identify "specific claims" or "specific records or statements used" in connection with a false claim. *See* N.Y. State Fin. Law § 192(1-a). Thus, it is sufficient that Relator alleges that each sale of Duraspine to the Government was caused by FieldTurf's allegedly fraudulent sales literature and its agents' knowing misrepresentations. (*See* Complaint ¶ 82). Under the NYFCA pleading standard, Relator need not allege which "specific records or statements used" were relied upon by each Government entity in connection with each specific sale of Duraspine. *See* N.Y. State Fin. Law § 192(1-a).

Second, Relator's allegations that FieldTurf intentionally omitted significant information regarding the quality of Duraspine fields are sufficient to state a NYFCA violation. The United States Supreme Court has held that "the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain *misleading omissions*." *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016) (emphasis added).[1] "When [] a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Id.*

Here, Relator alleges that the Government was fraudulently induced to purchase FieldTurf's fields and that FieldTurf misleadingly omitted material information regarding the fields' lack of durability when it sold the fields to the Government. In sum, Relator alleges that FieldTurf—despite

[1] Courts regularly rely on federal precedent to interpret the NYFCA which was closely modeled after the federal False Claims Act. *See, e.g., Kane ex rel. U.S. v. Healthfirst, Inc.*, 120 F. Supp. 3d 370 (S.D.N.Y. 2015).

a large-scale marketing campaign advertising its fields as having a ten-year lifespan—was entirely aware that its fields were failing after less than two years when it sold such fields to the Government. Based on the allegations that FieldTurf omitted material information regarding the defective nature of its products in connection with sales to the Government, Relator has pled one or more violations of the NYFCA sufficient to survive pre-answer dismissal.

However, Relator's causes of action under the NYCFCA are time-barred by that Act's shorter, six-year statute of limitations. *See* N.Y.C. Admin. Code § 7-806(a). Thus, all of Relator's causes of action under the NYCFCA are dismissed as time-barred because the Government did not purchase any fields from FieldTurf within six years of the filing of this action in June 2017.

Further, the NYFCA claims are subject to a ten-year statute of limitations. *See* N.Y. State Fin. Law. § 192(1). Thus, Relator's NYFCA claims with respect to fields purchased before June 20, 2007 are time-barred.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted in part and denied in part. The Clerk is directed to sever and dismiss the sixth, seventh, eighth, ninth, and tenth causes of action from the complaint; and it is further

ORDERED that Defendants answer the complaint within twenty days of this Decision & Order.

6/20/2019
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE