

Bishop v Combe Inc.
2020 NY Slip Op 31270(U)
May 4, 2020
Supreme Court, Kings County
Docket Number: 520600/2019
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of MAY 2020.

PRESENT:
HON. RICHARD VELASQUEZ

Justice.

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WADE BISHOP, RONALD TENRYK, and PATRICK WILLIAMS,

Plaintiffs,

Index No.: 520600/2019

-against-

Decision and Order

COMBE INCORPORATED and COMBE PRODUCTS, INC,

Defendants.

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The following papers numbered 4 to 12 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	4-8
Opposing Memorandum (Affirmations) _____	11
Reply Memorandum (Affirmations) _____	12
Memorandum of Law _____	9

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendants, COMBE INCORPORATED and COMBE PRODUCTS, INC (hereinafter COMBE), move for an order (1) pursuant to CPLR 3211(a)(7), dismissing plaintiffs first, seventh, and eighth causes of action for failure to state a cause of action;

(2) for a more definite statement of the complaint; and (3) to sever the claims of those unrelated plaintiff's at trial. Plaintiff opposes the same. (MS #1)

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). 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 (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **"The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **"[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion"** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401).

When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. "Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff..." *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 NYS2d 869 (Sup Ct 2013).

As previously stated, the determination to be made on a motion to dismiss is not whether there is a claim but whether the plaintiff has stated one. First, the court shall address the plaintiff's cause of action sounding in negligent misrepresentation and fraud. "The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages" (*Fox Paine & Co., LLC v. Houston Cas. Co.*, 153 AD3d 673, 677, 60 NYS3d 294; see *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147, 910 NE2d 976; *Introna v. Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898, 911 NYS2d 442). In addition to alleging all of the elements of a fraud cause of action, CPLR 3016(b) provides that "the circumstances constituting the wrong shall be stated in detail." The purpose of this heightened pleading requirement "is to inform a defendant with respect to the incidents complained of" and "should not be confused with unassailable proof of fraud" (*Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d at 491-492, 860 NYS2d 422, 890 NE2d 184); Quoting, *Minico Ins. Agency, LLC v. B & M Cleanup Servs.*, 165 AD3d 776, 777-78, 86 NYS3d 515, 517-18 (NY App Div 2018).

In the present case, the plaintiff's submissions, state "the basic facts to establish [those] elements," as required by CPLR 3016(b) (*Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d at 492, 860 NYS2d 422, 890 NE2d 184). "The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. The Court of Appeals has cautioned that "section 3016 (b) should not be so strictly interpreted "as to prevent an otherwise valid cause of action in situations where

it may be "impossible to state in detail the circumstances constituting a fraud" (*Lanzi v Brooks*, 43 NY2d 778, 780, 373 NE2d 278, 402 NYS2d 384 (Ct of Appeals, 1977), quoting, *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194, 239 NE2d 197, 292 NYS2d 98 (Ct. of Appeals, 1968). Thus, "where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud (*id. at 194*), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings" (see *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 285-286 [1987]; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97-98 [1st Dept 2003]; quoting, *Pludeman v. N. Leasing Sys., Inc.*, 10 NY3d 486, 491-92, 890 NE2d 184 (2008).

Specifically, the plaintiff alleges misrepresentations including but not limited to PPD and patch tests, intentionally made by COMBE when they were aware of issues and or concerns and or the falsity of such misrepresentations. Assuming the facts alleged to be true and according the plaintiff the benefit of every favorable inference, these allegations set forth a cognizable cause of action alleging fraud and stated in sufficient detail the facts constituting the wrong (see *Fox Paine & Co., LLC v. Houston Cas. Co.*, 153 AD3d at 677, 60 NYS3d 294; see also, *J & D Evans Constr. Corp. v. Iannucci*, 84 AD3d 1171, 1172, 923 NYS2d 864; *WIT Holding Corp. v. Klein*, 282 AD2d 527, 528, 724 NYS2d 66); Quoting, *Minico Ins. Agency, LLC v. B & M Cleanup Servs.*, 165 AD3d 776, 777-78, 86 NYS3d 515, 517-18 2 Dep't 2018).

Next, the court shall address the plaintiff's seventh cause of action sounding in manufacturing defect. To state a claim for a manufacturing defect, the plaintiff must satisfy the following elements by alleging; (1) the product was defective due to an error in the

manufacturing process and (2) the defect was the proximate cause of plaintiff's injury. *Pierre-Louis v. DeLonghi America, Inc.*, 66 AD3d 859, 860-61, 887 NYS2d 628 (2d Dep't. 2009). In addition, the Court may infer causation "when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in a particular case, solely the result of causes other than product defect existing at the time of sale or distribution." *Speller ex rel. Miller v. Sears, Roebuck and Co.*, 760 NYS2d 79, 81-82, 790 NE2d 252, 760 NYS2d 79 (2003). In the present case, the Plaintiffs satisfy these requirements by alleging that (1) Defendants' products "were defective in their manufacture and construction when they left the hands of Defendant in because they deviated from product specifications, which potentially poses a serious risk of injury" (2) Plaintiffs defendants Just For Men products "in the manner normally intended by Defendants" (3) "Just for Men products caused Plaintiffs injuries and Defendants were a substantial factor in causing that harm" and (4) "additional information concerning any defective manufacture is in the exclusive custody and control of the defendants". Additionally, plaintiffs also allege they suffered severe reactions, including burning, blistering, skin discoloration, redness, and swelling, after applying Just For Men as directed. Therefore, Plaintiffs have stated a claim for a manufacturing defect. **"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss"** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v.*

Goldman Sachs & Co., 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977).

Next, the court shall address the plaintiffs eighth cause of action sounding in violations of the New York General Business Law 349-350. New York General Business Law section 349 prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York." Gen. Bus. Law 349. Additionally, New York General Business Law Section 350 prohibits "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York." Gen. Bus. Law 350. Pursuant to New York General Business Law 349 or 350, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condit Co.*, 18 NY3d 940, at 941, 944 NYS2d 452 (2012). The allegations in plaintiff's complaint satisfied these requirements, by alleging that they followed the suggested patch test and that they suffered injury despite following the directions. Therefore, the defendants request to dismiss the plaintiff's eighth cause of action is hereby denied.

Next, the court shall address the defendants request for a more definite statement of complaint. Pursuant to CPLR 3013, the allegations of a complaint need not be set forth in detail; it is sufficient if the parties are put on notice of the underlying transactions or occurrences, and the material elements of the cause of action are stated." See CPLR 3013. It is well settled, that a claim is stated under New York's pleading standard when "the statements in the pleading, viewed with reason and liberality, are 'sufficiently

particular' to give defendants notice of the plaintiffs' claims . . . and of the elements of plaintiffs' alleged cause of action." See, *Elson v. Elson*, 149 AD2d 141, 144, 545 NYS2d 31 (2d Dep't. 1989). In the present case, plaintiffs have alleged the material elements of their claims and have placed defendants on notice of their causes of action. Plaintiffs have alleged they used Just for Men hair dye as directed and suffered injuries therefrom, and that the defendants had notice of such potential injuries to people and did not warn of the same. These allegations meet the liberal pleading standard, and "while much of what the plaintiff has stated may need to be demonstrated with specific information . . . such will be done through the discovery process." See also *Twine v. Belling*, 173 AD2d 815, at 815, 572 NYS2d 633 (2d Dep't. 1991). Therefore the request for a more definite complaint is hereby denied.

Finally, the court shall address the defendants request to sever the unrelated plaintiffs' claims for trial. Defendants contend the claims should be sever because the plaintiffs are unrelated and if the matters were to be tried together it would cause extreme prejudice. Plaintiffs in opposition contend that severance for separate trials is premature because the defendants have not even answered. Given this matter has had no discovery completed the court finds it is premature to sever the matters. Therefore, defendants request to sever the matters for trial is hereby denied with leave to renew upon completion of discovery. See *Witherspoon v Halpern*, 17AD3d 355, 791 NYS2d 855 (2 Dep't 2005); *Ellis v. Whippo*, 262 AD2d 1005, at 1056, 692 NYS2d 632, (2 Dep't 1999).

Therefore, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiff the benefit of every possible inference, it is

the opinion of this Court that the complaint sufficiently states a cause of action for all contended claims; at this pre-discovery stage of the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 827 NYS2d 231). Although facts sufficient to justify opposition may exist, they currently reside almost exclusively within the knowledge of the officers or employees of defendants (see CPLR 3211[d]). Moreover, in the case at bar, Plaintiff's sworn complaint constitutes evidence that there is a basis for all the causes of action. How credible that evidence is irrelevant at this juncture. Plaintiff must still make out a *prima facie* case against them at trial through competent evidence... (see *Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, *supra*, 202 AD2d 191, 608 NYS2d 214). As such, the plaintiff has plead facts sufficient to state a cause of action and the defendant has failed to submit any documentary evidence to the contrary.

Accordingly, Defendants, COMBE, motion to dismiss plaintiffs first, seventh and eighth causes of action), is hereby denied, for the reasons stated above. Defendants request for a more definite complaint is hereby denied. Defendants motion to sever the plaintiff's actions for trial is hereby denied with leave to renew upon completion of discovery, for the reasons stated above. (MS#1).

This constitutes the Decision/Order of the Court.

Date: MAY 4, 2020



RICHARD VELASQUEZ, U.S.C.

So Ordered
Hon. Richard Velasquez

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