

Lennon v Hom

2020 NY Slip Op 33112(U)

September 22, 2020

Supreme Court, New York County

Docket Number: 805183/2018

Judge: Arlene P. Bluth

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claims that defendants negligently dispensed Levothyroxine to plaintiff in contravention of her doctor's prescription.

Defendants point out that in August 2018, the Food and Drug Administration ("FDA") recalled all unexpired Levothyroxine due to an FDA investigation into the manufacturer of the active ingredients, but noted that patients currently taking the medication could continue until a replacement could be provided. Defendants contend that plaintiff did not include this recall in her first BP.

In her April 13, 2020 BP, plaintiff alleged that defendants distributed a defective and dangerous product and that defendants are strictly liable. Defendants argue that this second BP did not amplify the complaint and instead alleged a new cause of action.

In opposition and in support of her cross-motion to amend, plaintiff claims she properly amended her bill of particulars and defendants were clearly aware of the facts upon which this theory of liability is based. She contends that the amendments would not expand the scope of discovery and defendants will suffer no prejudice. Plaintiff emphasizes that amendment may be sought at any time and should be freely given.

In reply and in opposition to the cross-motion, defendants contend that the proposed amended pleading is devoid of merit because a pharmacy cannot be held liable under a strict liability theory. They insist that plaintiff's reliance on a class action against certain pharmacies for distribution of the subject medication is not proof that a pharmacist can be sued under New York law with a strict liability claim.

Striking the BP

“The purpose of the bill of particulars is to amplify the pleadings and may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint. Nor may the bill of particulars add or substitute a new theory or cause of action” (*Paterra v Arc Dev. LLC*, 136 AD3d 474, 475, 24 NYS3d 631 [1st Dept 2016] [internal quotations and citations omitted]).

The Court strikes the BP filed on April 13, 2020 because it clearly added a new theory of liability—strict liability. The complaint mentions nothing about a strict liability claim; rather it contends that defendants were negligent in dispensing the wrong drug. Therefore, in order to assert a strict liability theory, plaintiff must move (which she has) to amend her complaint.

Cross-Motion to Amend

“Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Y.A. v Conair Corp.*, 154 AD3d 611, 612, 62 NYS3d 116 [1st Dept 2017] [citation omitted]).

Generally, a retail pharmacist cannot be held liable under a theory of strict liability (*Bichler v Willing*, 58 AD2d 331, 397 NYS2d 57 [1st Dept 1977]). The First Department reasoned that when a pharmacist fills a prescription, the patient “does not rely on the druggist’s judgment as to whether that particular drug is inherently fit for its intended purpose but rather he places that confidence and reliance in the physician who prescribed the remedy” (*id.* at 334).

The Court cannot permit amendment to include a cause of action that is devoid of merit. Plaintiff cited no basis for alleging a strict liability theory against a pharmacist. Moreover, the FDA recall did not direct patients using Levothyroxine to discontinue using the drug and, in fact,

noted that “patients taking the recalled medicines should continue taking their medicine until they have a replacement product” (NYSCEF Doc. No. 26).

Defendants cited numerous cases in support of its claim that a pharmacist cannot be held liable under a theory of strict liability. In opposition and in support of her cross-motion, plaintiff failed to point to any binding precedent that could permit her to pursue such a claim against defendants. As defendants point out, her reliance on a class action does not establish that a strict liability theory can be pursued against a pharmacist under New York law.

Summary

The allegations in the complaint and the first BP are clear: defendants purportedly disseminated the wrong drug to plaintiff it and it caused her to experience numerous side effects. In other words, she alleges a negligence cause of action against a pharmacist for improperly filling a prescription. But plaintiff’s attempt to include a strict liability theory in its April 2020 BP alleges a new theory that is not supported by any caselaw. Therefore, the Court strikes the BP and denies the cross-motion. Plaintiff may not attempt to introduce any evidence supporting her strict liability theory at trial.

However, the Court denies defendants’ motion to the extent it seeks an advisory ruling that plaintiff be barred from supplementing her BP again or from making another motion for leave to amend in the future. Defendants will of course be entitled to raise objections if plaintiff were to seek additional relief.

Accordingly, it is hereby

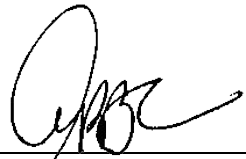
ORDERED that the motion to strike the bill of particulars dated April 13, 2020 is granted to the extent that this bill of particulars is stricken and plaintiff may not introduce any evidence

relating to the strict liability theory allegations contained in this bill of particulars; and it is further

ORDERED that the cross-motion by plaintiff for leave to amend is denied.

Remote Conference: September 23, 2020 at 11:30 a.m.

9/22/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE