SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** **IAS MOTION** 32

Justice

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MANFREDI FIUZZI,

Plaintiff,

- v -

PARAGON SPORTING GOODS CO. LLC, JOHN OR JANE DOES I-X, JOHN DOE CORPORATIONS V-X, GAIAM AMERICAS, INC.

Defendant.

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INDEX NO. 154392/2018

MOTION DATE N/A

MOTION SEQ. NO. 005, 006, 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 23, 24, 25, 26, 27, 28, 40, 41, 42, 57

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 23, 24, 25, 26, 27, 28, 40, 41, 42, 57

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 23, 24, 25, 26, 27, 28, 40, 41, 42, 57

were read on this motion to/for AMEND MOTION AND STRIKE AFF. DEF.

Upon the foregoing documents, the motion and cross-motions[1] are determined as follows:

As recounted by the court in its decision dated June 21, 2019, "[t]his action arises out of an incident that allegedly occurred on January 2, 2015 at a retail store operated by Paragon wherein, among other things, sporting goods are sold. Plaintiff avers that he was testing an elastic fitness band manufactured and distributed by Defendant SPRI Products, Inc. ("SPRI") when the band slipped from under his feet and "projectiled violently [into] Mr. Fiuzzi's right eye" causing injury".

Based upon these allegations, Plaintiff pled four causes of action against Defendant Paragon, to wit fraud, aiding and abetting fraud, breach of implied warranties and breach of express warranties in its first amended complaint. Paragon's motion to dismiss pursuant to CPLR §3211[a][7] was granted by decision and order dated June 21, 2019 wherein the causes of action were found to be insufficiently pled facially. While that motion was *sub judice* Plaintiff filed a second amended complaint on May 7, 2019.

[1] While *sub judice,* this action was reassigned to Justice Bluth. However, this court will render the decision as the motions were orally argued before this court.

relying on its judgment, that the device was not fit for its particular purpose, that Paragon should have discovered that the device was not fit for the particular purpose because of the manner in which the product was required to be used and that Plaintiff was injured as a result. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

To the extent Plaintiff moves to dismiss this claim based upon expiration of the statute of limitations, that basis was not stated in the notice of motion. In any event, Paragon was required, as a matter of law, to "establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the Plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

In the moving papers, Paragon failed to proffer any evidence when "tender of delivery" actually occurred (*see generally* UCC §2-725[2]). Accordingly, Defendant Paragon's motion is granted only to the extent that Plaintiff's second caused of action in his second amended complaint is dismissed as to Paragon.

The branch of the cross-motion (Seq. No. 5) seeking leave to replead against Defendant Paragon is, based on the foregoing, denied as unnecessary. The branch of this cross-motion to strike Paragon's statute of limitation affirmative defenses is denied as entirely unsupported. The affirmation in support of the motion incorporates the arguments in Plaintiff's memorandum of law in opposition to Defendant Gaiam's motion (NYSCEF No. 108). However, that memorandum makes no reference to Paragon's statute of limitations defense.

Defendant Gaiam Americas, Inc. ("Gaiam") moved (Seq No. 6) to dismiss Plaintiff's second amended complaint pursuant to CPLR §3211[a][5] and [7]. Plaintiff cross-moved to strike Gaiam's statute of limitations affirmative defense pursuant to CPLR §3211[b].

On the branch of the to dismiss a cause of action as barred by the statute of limitations, Gaiam, like Paragon, offered no proof when "tender of delivery" of the alleged offending product took place. Rather, movant premised its motion on the assumption "tender of delivery" occurred before the accident and accepted, *arguendo*, the cause of action accrued on the day of the accident January 2, 2015. Gaiam was included as a named Defendant for the first time in the second amended complaint which was filed on May 7, 2019. Gaiam posits that as this was more than four years after the accepted accrual date, the breach of warranty claims are barred by the four-year statute of limitations (*see generally* UCC §2-725).

In opposition, Plaintiff established an issue of fact as to whether the present claims against Gaiam relate back to the original complaint, filed on September 14, 2018 (*see generally* CPLR §203; *Buran v Coupal*, 87 NY2d 173 [1995]). That pleading contained breach of express and implied warranties against former Defendant SPRI Products, Inc. ("SPRI"), the purported manufacturer of the offending product. Here, Plaintiff proffered proof, via admissions from

Now, Defendant Paragon moves to dismiss the second amended complaint as improperly filed and for failure to state a claim. Plaintiff cross-moves for leave to amend and replead. Defendant Gaiam Americas, Inc. ("Gaiam") moves pursuant to CPLR §3211[a][1],[5] and [7] to dismiss the second amended complaint. By separate motion, Plaintiff moves for leave to supplement the record on Paragon's motion to dismiss (Mot. Seq. No. 5) and to strike Paragon's statute of limitations defense.

The branch of Paragon's motion to dismiss the second amended complaint pursuant to CPLR §3025[a] is denied. Since Paragon moved to dismiss the Plaintiff's prior pleading pre-answer, that extended Paragon's time to answer (CPLR §3211[f]) and, consequently, extended Plaintiff's time to amend the complaint as of right (*see* CPLR §3025[a]["A party may amend his pleading . . . at any time before the period for responding to it"]; *STS Mgmt. Dev. v New York State Dep't of Taxation & Fin.*, 254 AD2d 409 [2nd Dept 1998]).

Turning the branch of Paragon's motion to dismiss the second amended complaint pursuant to CPLR §3211, the movant, as with the previous motion, relied on no evidence and attacked the pleading as insufficient on its face.

As to the cause of action asserting breach of express warranty, for such a claim to subsist "there must be an affirmation of fact or promise by the seller, the natural tendency of which is to induce the buyer to purchase. Thus, for a buyer to recover for breach of express warranty, he must show that the warranty was relied on" (*Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [2d Dept 1973]). Here, Plaintiff again fails to plead any affirmative claims about the product made by Paragon. The assertions in the pleading that the packaging at the point of sale demonstrated the intended use of the product and made claim that it was approved as safe by the "American Council on Exercise", even if attributed to Paragon, fail to sustain a cause of action as Plaintiff failed to state facts or even claim that he understood or was aware of these assertions (*see Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2nd Dept 2003]).

On the sufficiency of the implied warranty cause of action, the plaintiff appears to plead that the complained of product was not of merchantable quality based upon its lack of fitness for its particular purpose (*see* UCC §3-214, §3-215). "The implied warranty of merchantability is a guarantee by the seller that its goods are fit for the intended purpose for which they are used and that they will pass in the trade without objection" (*Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 330 [3rd Dept 1997]; *see also Denny v Ford Motor Co.*, 87 NY2d 248 [1995]). A claim "that the product was not 'reasonably fit for [its] intended purpose', [is] an inquiry that 'focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners'" (*Wojcik v Empire Forklift, Inc.*, 14 AD3d 63, 66 [3rd Dept 2004] [internal citations omitted]).

Unlike the prior pleading which lacked "any facts" to support the implied warranty cause of action, the second amended complaint does not suffer from this defect. Although skeletal, in paragraphs 12 through 15, Plaintiff proffered facts support his claim that the exercise product was utilized by Plaintiff for a particular purpose, that Paragon knew or had reason to know that its customers would want the product for that particular purpose, that Plaintiff justifiably relied on Paragon's skill or judgment using the device, that Paragon knew that its customers would be

SPRI and documentary evidence, that prior to the accident and filing of the original complaint, Gaiam and SPRI legally merged pursuant to Colorado law (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983][A corporation that acquires the assets of another company generally is not subject to the liabilities of its predecessor, but liability will attach to the successor if: . . . there was a consolidation or merger of seller and purchaser"]; *see also State Farm Fire & Cas. Co. v Main Bros. Oil Co.*, 101 AD3d 1575, 1577 [3d Dept 2012]).

The branch of Gaiam's motion to dismiss the express warranty claim pursuant to CPLR §3211[a][7] is granted claim since, as with Paragon, Plaintiff neglected to plead he relied on any express representation made by Gaiam. Indeed, Plaintiff's claims concerning statements attributable to Gaiam were limited to the packaging. Further, he admits the offending product was unboxed and does not allege he reviewed and relied on the representations on the packaging before its use. The branch of Gaiam's motion to dismiss the breach of implied is denied in accordance with the court's reasoning in determining Paragon's motion supra warranty claim since the facts alleged support a claim against both Paragon and Gaiam.

The cross-motion (Seq No. 6) to dismiss Gaiam's statute of limitations defense is denied as movant failed to establish as a matter of law this defense fails to state a claim. As the court held supra, there is an issue of fact concerning whether the causes of action against Gaiam in the second amended complaint relate back to the original complaint as against SPRI.

Plaintiff's motion (Seq. No. 7) to supplement the record of motion sequence no. 5 is denied as the matter to be submitted, an unsworn expert report does not constitute evidence, documentary or otherwise, under either CPLR §3211[a][1] or [c]. The branch of this motion to dismiss Paragon's statute of limitations defenses is denied as movant failed to establish, as a matter of law, the action was timely commenced as a matter of law (*see generally* UCC §2-725).

4/3/2020
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
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