

Pankow v Bonide Prods., Inc.
2021 NY Slip Op 30996(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 158903/2018
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

JOHN PANKOW, KRISTINE PANKOW

Plaintiffs,

- v -

BONIDE PRODUCTS, INC, PLANT SHED, INC,

Defendants.

-----X

INDEX NO. 158903/2018
MOTION SEQ. NO. 001 002

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 24, 27 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 28, 29, 32, 33, 34 were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are hereby consolidated for disposition. In motion sequence number 001, defendant Plant Shed, Inc. (Plant Shed) seeks partial dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7). In motion sequence number 002, defendant Bonide Products, Inc. (Bonide) seeks dismissal of the complaint pursuant to CPLR 3211(a)(1) and (2).

Factual Background

Plaintiffs John Pankow and Kristine Pankow are New York residents. Plant Shed is a New York corporation that sells a variety of plants, floral, botanical and gardening products, including pesticides, insecticides, rodenticides and disease control products for plants. Bonide is a New York corporation that manufactures, designs, engineers, tests, distributes, markets, imports, and sells a variety of garden products, including Bonide Systems Insect Control (Bonide Insecticide).

Plaintiff Kristine Pankow keeps and maintains indoor houseplants in plaintiffs' New York apartment, most of which were purchased at Plant Shed. Sometime in 2014, she visited Plant Shed and spoke to a store clerk about a white residue she found on her plants and asked for a product to treat the problem. The clerk recommended Bonide Insecticide and brought her to its display, where the bottle stood alongside other pesticides. Kristine Pankow bought a bottle and took it home. After reading the instructions on the bottle of Bonide Insecticide, she felt intimidated by what she read and decided not to use it. Instead, she placed the unopened bottle under the apartment's kitchen sink in a storage container with other cleaners.

Approximately two years later (November 2016), plaintiffs returned to their New York apartment after an extended trip. Upon returning, they were informed by a friend that he smelled an odor coming from underneath their kitchen sink. When inside their apartment, plaintiffs discovered a greasy substance on the bottles of the storage bins and a stain from said substance on the wood floor of the sink cabinet. This smell intensified over the next few days, and plaintiffs began to experience nausea, lightheadedness, and dizziness.

Plaintiff discovered the source of the odor when they found that the Bonide Insecticide bottle was empty, despite never being opened. The seal on the bottle was intact but the bottle was "puffed out" with air pressure, as though gas had escaped. Upon concluding that the bottle was the source of the smell, plaintiffs called Poison Control on November 18, 2016. After several phone conversations with Poison Control and Hillman Consulting, an environmental control company, plaintiffs cleaned the spill and discarded porous and semi-porous materials in the apartment. The subject bottle was not preserved and was discarded.

Plaintiffs commenced this action for personal injuries related to inhaling and touching the liquid, and for property damage related to the loss of the discarded materials in their apartment.

The complaint alleges six causes of action: Count One is against Bonide for strict liability alleging manufacturing defect, design defect, and failure provide proper instructions and warnings. Count Two asserts a negligence claim against Bonide alleging that Bonide breached its duty of due care by failing to manufacture, design, and test its product in a proper manner, by failing to provide proper instructions and warnings on its product, and by failing to properly package its product. Counts Three, Four, Five, and Six of the complaint are brought against Plant Shed alleging, respectively, strict liability, negligence, breach of warranty, and violation of section 349 of the General Business Law (GBL) for alleged deceptive practices in a consumer-oriented transaction.

Motion Sequence Number 001

Plant Shed moves to dismiss the sixth cause of action for violation of section 349 of the GBL on the ground of failure to state a cause of action. To plead a cause of action for deceptive trade practices, plaintiffs must allege (1) a deceptive “consumer-oriented practice” that was misleading in a material respect, and (2) injuries resulting from the deceptive and misleading acts.

Plaintiffs allege that a clerk at Plant Shed misrepresented to Kristine Pankow that the Bonide Insecticide was safe for use and storage indoors, when in fact it was suitable only for outdoor use. Plaintiffs also assert that the Bonide Insecticide was on display in close proximity to indoor houseplants also displayed for sale, which allegedly further gave the impression that the Bonide Insecticide was safe for indoor use.

Even if the representations by the clerk regarding the safe indoor use of the Bonide Insecticide was “misleading in a material respect” as required by the statute, plaintiffs have failed to allege a “consumer-oriented transaction” that “have a broader impact on consumers at large.” *Oswego Laborers Local 214 Pension Fund v. Marine Midland, N.A.*, 85 N.Y.2d20, 25 (1995). Rather, the complaint describes a “single-shot transaction” between Kristine Pankow and a store

clerk who recommended the Bonide Insecticide for indoor use, which had no impact on consumers in general. See, *Id*; see also, *Genesco Entertainment v Koch*, 593 F.Supp 743 (S.D.N.Y. 1984). Further, the Court declines to infer a deceptive and misleading trade practice with a broad impact on consumers at large based on the proximity within the store between the insecticide display (which included insecticides for outdoor use) and houseplants that were also for sale. It is also not clear from the complaint what specific misrepresentations were made regarding storage, as the statements attributed to the store clerk appear to relate solely to usage, and the product was never used. Accordingly, the sixth cause of action is dismissed.

Motion Sequence Number 002

Defendant Bonide moves for dismissal of the two causes of action brought against it, strict liability and negligence. It does so on the ground of subject matter jurisdiction; specifically, federal preemption based on the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, which provides that a state law action may be foreclosed by a congressional enactment.

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and the regulations promulgated thereunder, impose approval and labeling requirements on manufacturers of insecticides, fungicides, and rodenticides based on each product's effectiveness and potential harmfulness to humans. See *Esposito v. Contect, Inc.*, 147 A.D.3d 1384, 1385 (4th Dep't 2017). FIFRA also establishes a complex process of review by the Environmental Protection Agency ("EPA"), culminating in the approval of the label under which the product is to be marketed and packaged. See 7 USC § 136a. "The EPA will register the pesticide if it determines that the pesticide is efficacious and will not cause unreasonable adverse effects on humans and the environment, and that its label complies with FIFRA's prohibition on misbranding." *Mortellite v. Novartis Crop Protection, Inc.*, 460 F3d 483, 488 (3d Cir. 2006). FIFRA also provides that, "[a]s

long as no cancellation proceedings are in effect registration of a pesticide shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of the subchapter." 7 U.S.C. § 136a(f)(2). As a result, causes of action predicated on alleged inadequacies of a product label and the failure to warn are preempted by FIFRA. *Babalola v. Crystal Chemicals, Inc.*, 258 A.D.2d 367 (1st Dept. 1999) (granting motion to dismiss because the product label in question had been "duly reviewed by the Environmental Protection Agency and found to be in compliance in all regards with the requirements of FIFRA"); *Restrepo v. Rockland Corp.*, 38 A.D.3d 742, 743 (2d Dept. 2007)(noting that FIFRA preempts state law causes of action based on inadequate labeling or a failure to warn); *Esposito v. Contec, Inc.*, 147 A.D.3d 1384 (4d Dept. 2017) (dismissing as preempted under FIFRA all claims based on a failure to warn; "Any jury verdict or court determination in favor of plaintiff...would amount to a state rule or requirement at odds with the EPA-approved warning label on the product, i.e., a state rule relating to labeling and packaging that would impose requirements additional to or different from those imposed by the federal statute and regulations"); *Johnson v. Monsanto Chem. Co.*, 129 F.Supp.2d 189 (N.D.N.Y. 2001) (finding that "state common law tort claims which would create additional or different labeling requirements from those required under FIFRA" are expressly preempted; negligence claims "predicated on failure to warn an inadequate labeling" are preempted by FIFRA).

Although the actual container was disposed of by plaintiffs, Bonide states that the label on its Bonide Insecticide provides under "Restrictions" the following: "Do not apply the product in a way that will contact people or pets." "For outdoor homeowner use only." "Do not apply to plants to be used for food or feed." Under another section entitled "Restrictions," the bottle states: "Do not allow people or pets to enter the treated area until sprays have dried." Additionally, under the

section, PESTICIDE STORAGE, the bottle reads: “Keep pesticide in original container. Do not put concentrate or dilute into food or drink containers ... Store in a cool, dry place, preferably in a locked storage area.”

The label already clearly stated that the Bonide Insecticide was for outdoor use only, and, in any event, the insecticide was never used. Thus, the essence of plaintiffs’ causes of action in relation to the inadequacy of the warnings and instructions relates to storage; specifically, that the label should have provided additional information regarding long term storage. Such requirement would go beyond the label already approved by the EPA and therefore must be preempted. As a result, the allegations asserted against Bonide in the First cause of action for strict liability, and the Second cause of action for negligence, based on the inadequacy of the warning label (i.e., paragraphs 43(e) and (f), and 61(h) and (i), respectively), are dismissed.

On the other hand, claims based on the alleged inadequacy of the testing, manufacture, or design of the packaging of the product (i.e., the physical aspects of the container in which the Bonide Insecticide was kept), are not preempted. Unlike the text of a warning label, the EPA does not impose any insecticide packaging requirements, other than those related to child-resistant packaging.

Plaintiff cites two cases directly on point that stand for the proposition that, unlike claims based on the inadequacy of an EPA-approved labeling, claims based on the physical aspects of the packaging are not preempted, except with regard to child-resistant packaging. See, *Hawkins v. Leslie’s Pool Mart, Inc.*, 184 F.3d 244, 255 (3d Cir. 1999)(“...we conclude that unless the EPA has specifically considered the packaging methods for a pesticide product, the domain preempted is the narrow area of child-resistant packaging. As such, [plaintiff’s] claims for defective packaging are not preempted.”); *Lucas v. Bio-Lab, Inc.*, 108 F.Supp.2d. 518 (E.D.Va 2000)(“EPA

has not regulated packaging, except in a very narrow way that, as to design, imposes requirements to protect children younger than five years old. The EPA has elected, however, not to impose packaging requirements for the protection of the principal users of pesticides-adults. Where the EPA has so obviously chosen not to exercise its Congressionally-confirmed authority to impose packaging design requirements, it would be a remarkable exercise of federal judicial power to foreclose all State packaging design law other than that applicable to child-resistant packaging.”).

Notably, defendants do not offer a single case on point that directly contradicts these holdings in relation to claims related to the physical aspects of the packaging, and *Bates*, which involves claims regarding the adequacy of a warning label and not the design or manufacture of the packaging, is inapposite in this specific regard.

Claims pertaining to the testing, manufacturing and/or design of the Bonide Insecticide itself (i.e., the contents) are also not covered by FIFRA and, thus, also not subject to preemption. *Dow Agrosciences LLC v Bates*, 332 F3d 323 (5th Cir 2003), *vacated & remanded* 544 US 431 (2005); see also, *Babacon v Crystal Chem., Inc.*, 225 A.D.2d 370, 371 (1st Dept. 1996). Accordingly, to the extent that plaintiffs assert such claims in their complaint, and without comment of the factual sufficiency of any such claim, such claims are not preempted by federal law and not dismissed on that basis.¹

Accordingly, it is

ORDERED that defendant Plant Shed, Inc.’s motion to partially dismiss the complaint (Motion Sequence Number 001) is granted to the extent of dismissing Count Six of the complaint; and it is further

¹ As defendants sought dismissal solely on the basis of preemption, the Court does not opine on dismissal of any claims on any other basis.

ORDERED that defendant Bonide Products, Inc.'s motion to dismiss the complaint (Motion Sequence Number 002) is granted to the extent that all allegations contained in Counts One and Two of the complaint that are based on the inadequacy of warnings and/or instructions are dismissed on preemption grounds and is otherwise denied.

03/31/2021

DATE



JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE