

Pasik v Sabra Dipping Co., LLC

2022 NY Slip Op 34852(U)

April 11, 2022

Supreme Court, Nassau County

Docket Number: Index No. 607469/2020

Judge: Robert A. McDonald

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. MCDONALD,
J.S.C.

-----x
ELLIOT PASIK,

Plaintiff,

IAS PART: 10

-against-

Index No.: 607469/2020

Mot. Seq.: 001, 002

SABRA DIPPING COMPANY, LLC,
PEPSICO, INC., AND STRAUSS
GROUP, LTD.,

X X X

Defendants.
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Upon review and consideration of the papers electronically filed with respect to motion sequences 001 and 002 herein, under NYSCEF Document Numbers 7-20, 24-30, and 32-46, the Court finds as follows.

This motion by the defendants for an order pursuant to CPLR 306-b, 311 and 3211 (a) (1), (7), (8) dismissing the plaintiff's complaint in its entirety or, in the alternative, for an order pursuant to CPLR 306-b, 311 and 3211 (a) (8) directing a traverse hearing to determine whether service was properly made, and jurisdiction obtained over defendant Strauss Group, Ltd., is determined as provided herein.

This motion by the plaintiff for an order pursuant to CPLR 311 extending his time to serve defendant Strauss Group, Ltd., and permitting alternate method of service on it is determined as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries he allegedly sustained after eating Sabra Dipping Company's ("Sabra") red pepper hummus on June 6, 2020. He alleges that the hummus contained tahini a/k/a ground sesame and glyphosate which caused him to suffer a severe allergic reaction. The plaintiff claims that the lid or cover of the hummus' container identified the product as "red pepper hummus" and as such, was misleading, misbranded and mislabeled because it omitted any reference to tahini or sesame. In addition, he alleges that sesame is a well-known allergen; that defendants knew or should have known that; and, that defendants were negligent in failing to indicate that their product contained hummus on the lid or front of the of the package. He faults defendants for labeling its product solely as "hummus" and not "hummus with tahini" or "chickpea paste with sesame," or similar words. He alleges that many of defendants' competitors indicate that their hummus contains tahini or sesame on the lid. He notes that the defendants have acknowledged that hummus is comprised of two primary ingredients; chickpeas and tahini a/k/a ground sesame. He alleges that "compliance with law, regulation and common sense" required that tahini or sesame be prominently displayed on

the product's lid. While the plaintiff acknowledges that the "INGREDIENTS" listed on the side of the container lists "tahini (ground sesame)," he alleges that that portion of the label is obscure and fails to adequately inform the user that the product contains sesame.

The plaintiff has alleged that the defendants have violated 21 CFR § 101.18 (b) entitled "Misbranding of Food." That regulation provides that:

"The labeling of a food which contains two or more ingredients may be misleading by reason (among other reasons) of the designation of such food in such labeling by a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling."

He alleges that he relied on the lid of the package which indicated that the product contained hummus/chickpea spread and that had the lid indicated that the product also contained tahini or sesame, he would not have consumed it.

The plaintiff also alleges that the product's label violated 21 CFR § 343 (a) because the product name on the lid is "false [and] misleading," based upon its failure to indicate that the product contained tahini or sesame as a primary ingredient. He alleges that the defendants violated 21 CFR § 343 (f) which provides that a food shall also be deemed misbranded:

"[i]f any word statement or other information *required by or under authority of this chapter to appear on the label* or labeling is not prominently displayed or conspicuously reflected on the lid (as compared with other words, statements, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use (emphasis added)."

Similarly, he alleges that defendants have also violated and 21 CFR § 101.15 entitled "Food; prominence of required statements" insofar as the words "tahini (ground sesame)" are not prominently displayed.

Plaintiff also alleges that by misbranding their product, the defendants have violated the Federal Trade Commission ("FTC") Act by engaging in a deceptive practice in commerce and have engaged in false advertising and violated the New York State Agricultural & Markets Law and Virginia State Code.

Finally, the plaintiff alleges that the defendants' product contained glyphosate which is a known human cancer-causing substance. He alleges that the Environmental Working Group issued a memorandum on July 4, 2020, which reported that Sabra's hummus contains "shockingly high levels of cancer linked glyphosate," which was not disclosed on the defendants' product, either, in alleged violation of federal regulations.

The plaintiff has advanced claims sounding in negligence, products liability, breach of implied and express warranty and violations of General Business Law § 349. He also seeks punitive damages.

All of the defendants seek, inter alia, dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (7) based upon, inter alia, the United States Food and Drug Administration's ("FDA") approval of the hummus' label as well as the doctrine of federal preemption. The defendant Strauss Group, Ltd., also seeks dismissal of the complaint against it based upon a lack of personal jurisdiction; the plaintiff in response has sought an extension of time to serve the Strauss Group, Ltd., as well as an alternate means of service.

A motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) will be granted when it is established that service of process upon a defendant was not properly effectuated (*Bank of New York Mellon v Lawson*, 176 AD3d 1155, 1157 [2d Dept 2019]). " 'Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service' " (*Bank of New York Mellon v Lawson*, 176 AD3d at 1157, quoting *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). " 'Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing' " (*Bank of New York Mellon v Lawson*, 176 AD3d at 1157, quoting *U.S. Bank, N.A. v Tauber*, 140 AD3d 1154, 1155 [2d Dept 2016][citation omitted]).

Defendant Strauss Group, Ltd., was allegedly served on September 8, 2020, via service on "John Doe" for Strauss Group, Ltd., c/o Shay Bialik. The affidavit of service indicates that the process server "knew the person so served to be the authorized party/managing agent and stated that (s)he was authorized to accept legal papers for the corporation." In her affidavit, Bialik attests that she hasn't resided in the United States since June 9, 2020, nearly three months before the date on which service was allegedly made upon Strauss Group, Ltd., via service on her. Bialik attests that she has resided in Israel since that time. In fact, she attests that she never worked for Strauss Group, Ltd., when she lived in New York; She was the Permanent Mission of Israel to the United Nations. Bialik attests that she only began working for Strauss Group, Ltd., on August 2, 2020, at which time she resided in Israel. Bialik also attest that she did not authorize anyone in the United States to accept service on her behalf nor did Struss Ltd.

Standing alone, an affidavit denying residency, without more, is insufficient to raise an issue of fact regarding service which necessitates a traverse hearing (*Wells Fargo Bank, N.A. v Enitan*, 200 AD3d 736 [2d Dept 2021] ["the defendant's unsupported averment that he did not reside at the subject property at the time of service was insufficient to rebut the presumption of proper service created by the process server's affidavit"], citing *Bank of New York Mellon v Lawson*, 176 AD 3d at 1157 see also, *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 821 [2d Dept 2012]; cf. *Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776, 777-778 [2d Dept 2017]).

The defendants have failed to submit any documentary evidence to support Bialik's claim that she did not reside in New York at the time she was served or that she lived in Israel then nor

have they submitted an affidavit from the person served at the address at which Bialik was served denying receipt of a copy of the summons and complaint or stating that she did not live there (*Bank of New York Mellon v Lawson*, 176 AD 3d at 1157, citing *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d at 821; cf. *Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d at 777-778). The defendants have not established their entitlement to dismissal of the complaint against the Strauss Group, Ltd., based upon a lack of personal jurisdiction. Nor have they established that a traverse hearing is even warranted (*Wells Fargo Bank, N.A. v Enitan*, supra).

“To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) based on a defense founded upon documentary evidence, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiffs' claim” (*DiGiacomo v Levine*, 76 AD3d 946, 949 [2d Dept 2010], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]; *Newcomb v Sims*, 63 AD3d 1022, 1023 [2d Dept 2009]). Bare legal conclusions and factual allegations that are “flatly contradicted by documentary evidence in the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (citations omitted)’” (*Deutsche Bank National Trust Co. v Sinclair*, 68 AD3d 914, 915 [2d Dept 2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]).

First and foremost, the court notes that the “INGREDIENTS” label on Sabra’s red pepper hummus listed “tahini (ground sesame)” as the third ingredient after “cooked chickpeas (water, chickpeas)” and “water.” In addition, the Merriam-Webster dictionary defines “hummus” as “a paste of pureed chickpeas usually mixed with sesame oil or sesame paste and eaten as a dip or sandwich spread.”

In seeking dismissal of the complaint based upon documentary evidence, the defendants rely on the Establishment Inspection Report (“EIR”) which the Food and Drug Administration (“FDA”) issued on June 19, 2019, based upon an inspection of Sabra’s manufacturing facility on May 7th & 8th, 2019. That report states, inter alia,:

The current inspection covered the firm’s product labels.... During the inspection, we performed a field examination of the following products...Sabra Red Pepper Hummus... We noted no objectionable conditions or observations during...review of these labels.

The preemption provision found at 21 USC § 343-1(a) expressly preempts any state law requirement that is “not identical to” specified misbranding or food labeling provisions of the Food, Drug and Cosmetics Act (“FDCA”). “The Nutrition Labeling Education Act (“NELA”) which is a 1990 amendment to the FDCA prohibits states from ‘directly or indirectly establish[ing]...any requirement...made in the labeling of food that is not identical to’ the federal labeling requirements established by certain specifically enumerated sections of the FDCA” (*Koenig v Boulder Brands, Inc.*, 995 F Supp 2d 274, 280 [SDNY 2014], quoting 21 USC § 343-1[a]). “In the context of express preemption provisions, ‘the term “requirements”...reaches beyond positive enactments, such as statutes

and regulations, to embrace common-law duties' ” (*In re PepsiCo, Inc., Bottled Water Mktg. and Sales Practices Litig.*, 588 F Supp 2d 527, 532 [SDNY 2008], quoting *Bates v Dow Agrosciences L.L.C.*, 544 US 431, 443 [2005]; accord *Riegel v Medtronic, Inc.*, 552 US 312 [2008] (“reaffirming that common-law causes of action for negligence and strict liability impose ‘requirements’”). “In other words, state law causes of action are not preempted where they merely provide a damages remedy for claims premised on a violation of federal law that does not itself provide a private right of action, but are preempted where they impose obligations not imposed by federal law” (*In re PepsiCo, Inc., Bottled Water Mktg. and Sales Practices Litig.*, 588 F Supp 2d at 532, citing *Riegel v Medtronic, Inc.*, 552 US at 525). Accordingly, any claim under state law that is inconsistent with federal regulations is preempted by federal law (*Koenig v Boulder Brands, Inc.*, 995 F Supp at 280, citing 21 USC § 343–1[a]).

Under the FDA regulations,

“The term ‘label’ means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper (21 USCA § 321 [k]).”

“[T]he term ‘labeling’ means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article” (21 USCA § 321 [m]).

The federal regulations provide that “food shall be deemed to be misbranded” if “its labeling is false or misleading in any particular” (21 USC § 343 [a]). It is misbranded if it fails to name a major food allergen contained in the product (21 USC § 343 [w]). The FDA’s regulations lists milk, eggs, fish, wheat, peanuts, tree nuts, shellfish and soy as “major food allergens” (21 USC § 321 [qq]; *Matt v Pret a Manger (USA) Ltd.*, 2018 WL 656460 at *4 [NY Sup Ct NY County 2018]). Neither tahini nor sesame are listed as a major food allergen by the FDA. In fact, sesame is listed in 21 CFR §§ 182.10 and 582.10 which are titled “Spices and other natural seasonings and flavoring” and provides that it is “generally recognized as safe for [its] intended use within the meaning of Section 409 of the [FDCA]”). And, spices needn’t be specifically identified in a product label and may simply be listed as a “spice” (21 CFR § 101.22 [h] [1]; 101.22 [a] [2], 182.10). Since sesame is not listed as a major food allergen by the FDA, the plaintiff cannot rely on federal regulations in advancing his claim that the subject product was mislabeled (*Matt v Pret a Manger (USA) Ltd.*, 2018 WL 65460 at *4). And again, any finding that the label fails would be contrary to the federal regulations and therefore preempted (see *infra*).

In fact, the court notes that following the FDA’s solicitation and review of comments on the possibility of listing sesame as a major food allergen, notices from the Commissioner of the FDA in 2018 were issued specifically advising that sesame was not then considered a major food allergen and was not required to be listed on food labels. In fact, again, under the federal

regulations, sesame needn't be specifically listed at all in the ingredients (*Matt v Pret a Manger (USA) Ltd.*, 2018 WL 656460at *4). In any event, the ingredients listed on Sabra's red pepper hummus specifically listed "tahini (ground sesame)" as an ingredient.

Standing alone, the EIR constitutes the FDA's approval of the labeling of the defendants' product and conclusively indicates that it is in compliance with all of the applicable federal regulations. The EIR therefore entitles the defendants to dismissal of the complaint against them pursuant to CPLR 3211 (a) (1) since any finding to the contrary, i.e., that the label is defective in any way, would be preempted by federal law.

To the extent that the plaintiff bases his claims purely on alleged violations of the FTC Act, there is no private right of action for that (*Federal Trade Commission v Klesner*, 280 US 19, 25 [1929] [There is no private cause of action under the FTC Act. Only the Commissioner may bring an action for violations of it]).

Since the defendants' product was approved by the FDA shortly before the plaintiff consumed it, the plaintiff's claims sounding in products liability, negligence and breach of implied and express warranties are preempted by the federal regulations (*Kirilescu v Am. Home Products Corp.*, 278 AD2d 457 [2d Dept 2000] app dismissed, 96 NY2d 933 [2001], citing 21 USC § 301 et seq.; 21 CFR § 211.132; *Warner v American Fluoride Corp.*, 204 AD2d 1 [2d Dept 1994]; *Babalola v Crystal Chemicals, Inc.*, 225 AD2d 370, 371 [1st Dept 1996], citing *June v Laris*, 205 AD2d 166 3d Dept 1994], lv denied 85 NY2d 955 [1995]; *Warner v American Fluoride Corp.*, supra; *Kennedy v Naka*, 47 Misc 3d 1205 [A] [Sup Ct Westchester County 2015], citing *Riegel v Medtronic, Inc.*, 552 US at 330; *Mitaro v Medtronic, Inc.*, 73 AD3d 1142 [2nd Dept 010]; *Messner v Medtronic, Inc.*, 39 Misc 3d 1213(A) [Sup Ct Richmond County 2013]; *Tansey v Cochlear Ltd.*, 2014 WL 4829453 [EDNY 2014]; *Cordova v Smith & Nephew*, 2014 WL 3749421 [EDNY 2014]).

As for the plaintiff's common law negligence claim, "[w]here, as here, the manufacturer has complied with the Federal packaging and labeling requirements, a State tort action challenging the adequacy of those warnings is preempted by the Federal [FDCA] and the regulations promulgated thereunder (*Kirilescu v Am. Home Products Corp.*, 278 AD2d at 458, citing 21 USC § 301 et seq.; 21 CFR § 211.132; *Warner v American Fluoride Corp.*, supra; see also, *Wallace v Parks Corp.*, 212 AD2d 132, 137 [4th Dept 1995]). Accordingly, to the extent that plaintiff continues to maintain that the defendants were negligent in failing to properly indicate that the product contained sesame, his claims fail.

The plaintiff's claim regarding glyphosate is also preempted by federal law. Not only must state labeling requirements be identical to federal requirements, but federal law also expressly prohibits state law from requiring that glyphosate be listed on a label insofar as it provides no state "may directly or indirectly establish ...any requirement for the labeling of food...that is not identical to the requirements" of the federal regulations (21 USC § 343-1 [a][2],[5]).

Glyphosate is "a widely used herbicide that controls broadleaf weeds and grasses (Environmental Protection Agency ["Glyphosate"])". Certain pesticides and chemical residues are permitted to be in food as long as they are below the tolerance level set by the FDA (21 USC

§ 346 (a) (1) (A), (a) (2) (A) (“Tolerance and Exemptions”). In 2020, “the EPA continue[d] to find that there are no risks of concern to human health when glyphosate is used in accordance with its current label” (Environmental Protection Agency, 4 Toxic Torts Litigation Guide § 45:10). The EPA also concluded in 2020 that “[r]esidues of glyphosate on any food or feed item are safe for consumers if they comply with the established tolerances.” Before allowing the use of a pesticide on food crops, EPA sets a tolerance or limit on how much pesticide residue can legally remain on food and feed products or commodities. The complete list of tolerances for glyphosate can be found in 40 CFR § 180.364. If residues are found above the established tolerance level, the commodity will be subject to seizure by the government. Similar to the food labeling preemption doctrine, federal standards governing pesticides also preempt any state laws or policies (21 USC § 346a [n] [4]).

The plaintiff has not identified how much glyphosate was contained in the hummus he consumed, nor has he alleged that the product’s use violated federal or state laws. In fact, 40 CFR § 180.364 (a) which applies to chickpeas establishes a tolerance level for residues of glyphosate of 5.0 ppm or parts per million. The report relied on by the plaintiff provides that the defendants’ red pepper hummus contains 115 ppb or parts per billion of glyphosate which converts to .115 ppm which is 40 times lower than the federal tolerance limit. Again, state law is limited in this regard by federal preemption (21 USC § 346a [n] [4]). The defendants have established that they have not acted in violation of any law or policy by failing to list glyphosate as an ingredient on their hummus.

Assuming, *arguendo*, that the state law claims are not preempted by federal law, “[g]iven that failure-to-warn cases are governed by negligence principles, it is incumbent on the court ... to decide whether an applicable legal duty exists” (*Matter of New York City Asbestos Litig.*, 27 NY3d 765, 787 [2016]). A manufacturer is required to warn only of those allergic reactions that are “‘common to [a] substantial number of possible users’ ” (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992], quoting *Kaempfe v Lehn & Fink Prods. Corp.*, 21 AD2d 197, 201 [1st Dept 1964], *affd* 20 NY2d 818 [1967]).

“ ‘If the allergy is one common to any substantial number of possible users, the seller may be required at least to give warning of the danger.’ On the other hand, ‘in the ordinary case, the maker may also assume a normal user; and he is not liable where the injury is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population’ ” (*Kaempfe v Lehn & Fink Products Corp.*, 21 AD2d at 201, citing *Prosser Torts* (2d ed.), § 84, p. 503).

“In light of the foregoing, the plaintiff, as the basis for imposing upon defendant a special duty of warning, [is] bound at the very least to show (1) that [h]e was one of a substantial number or of an identifiable class of persons who were allergic to the defendant’s product, and (2) that defendant knew, or with reasonable diligence should have known of the existence of such number or class of persons” (*Kaempfe v Lehn & Fink Products Corp.*, 21 AD2d at 201).

The defendants have established that neither sesame nor glyphosate meet the standards necessary for recovery here. In fact, in response to an invitation for comments on whether sesame

should be considered an allergen by the FDA, the responses overwhelmingly established a data gap of evidence of sesame allergies. Despite solicitations, the FDA could not establish that a substantial number of people have displayed an allergic reaction to sesame. And, the defendants' data establishes that the negligible amount of glyphosate in defendants' hummus does not pose a danger when consumed, either.

Strict products liability sounds in tort and privity is not required (*Wheeler v Sears Roebuck & Co.*, 37 AD3d 710, 710 [2d Dept 2007], citing *Sprung v MTR Ravensburg*, 99 NY2d 468, 472 [2003]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 60 [2d Dept 2003], app dismissed 100 NY2d 614 [2003]). "Under New York law, a product defect may be actionable under a strict products liability theory if the product is not reasonably safe. Liability is determined by a negligence-like risk/benefit inquiry that looks at the likelihood that the product will cause injury if not properly made, and the reasonableness of the actions (or inactions) taken by the seller/supplier/manufacturer's in ensuring that the product was made safe" (*Rudloff v Wendy's Rest. of Rochester, Inc.*, 12 Misc 3d 1081, 1084-85 [Buffalo City Ct 2006], citing *Denny v Ford Motor Co.*, 87 NY2d 248, 256-59 [1995]). Since the analysis employed in the products liability claim mirrors the analysis of the negligence claim, the strict products liability claim fails, too.

Claims based upon breach of an implied warranty are based on contract and privity is required (*Aracena v BMW of N. Am., LLC*, 159 AD3d 664, 665-666 [2d Dept 2018]). The defendants have established their entitlement to dismissal of the plaintiff's claim sounding in breach of an implied warranty based upon a lack of privity.

"A cause of action alleging breach of an express warranty requires evidence that the defendant breached a specific representation made by a manufacturer regarding a product upon which the purchaser relied (emphasis added)" to his or her detriment (*Aracena v BMW of N. Am., LLC*, 159 AD3d at 665, citing *CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503 [1990]; *Cecere v Zep Mfg. Co.*, 116 AD3d 901, 902 [2d Dept 2014]; *Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 1116 [3d Dept 2008], lv denied, 11 NY3d 708 [2008]). A claim sounding in breach of express warranty does not require privity, either (*Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2d Dept 2003], citing *Randy Knitwear v American Cyanamid Co.*, 11 NY2d 5 [1962]). "New York breach of express warranty claims require a material statement amounting to a warranty; (ii) the buyer's reliance on this warranty as a basis for the contract with his immediate seller; (iii) the breach of this warranty; and (iv) injury to the buyer caused by the breach" (*Lugones v Pete and Gerry's Organic, LLC*, 440 F Supp 3d 226, 244 [SDNY 2020], quoting *Brady v Basic Research, L.L.C.*, 101 F Supp3d 217, 235 [EDNY 2015], quoting *Avola v Louisiana-Pacific Corp.*, 991 F Supp 2d 381, 391 [EDNY 2013]).

In his complaint, the plaintiff alleges that the defendants breached their warranty by concealing the fact that their product's primary ingredients consisted of sesame-tahini and glyphosate. "In decisions compatible with the label-based preemption doctrine, courts have rejected preemption when the plaintiff's claim is founded, for example, on breach of express warranty, in that a manufacturer who expressly and voluntarily warrants its product beyond what [federal law] mandates, undertakes a contractual-type commitment (emphasis added)" (*Mann v H.W. Andersen Products, Inc.*, 246 AD2d 68, 72 [2d Dept 1998], lv dismissed, 93 NY2d 888 [1999], *ISK Biotech Corp. v Douberty*, 640 So 2d 85 [Fla Dist Ct App 1994]; *Walker v Am.*

Cyanamid Co., 130 Idaho 824, 948 P2d 1123 [1997]; *Kid's Stuff Learning Ctr., Inc. v State Dept. of Human Resources*, 660 So 2d 613, 616 [Ala Civ App 1995]).

Here, at best, the express warranty is found in the label; no representations beyond that have been alleged. Plaintiff alleges that defendants “concealed” or failed to indicate that its product contained sesame and glyphosate. It appears that the plaintiff has not even stated a claim for breach of an express warranty because he has not set forth what material statement the defendants made; Rather, he has faulted them for an alleged omission, i.e. their failure to indicate on the label that their product contained sesame and glyphosate. Curiously, to the extent that the defendants’ label went beyond what federal law requires by listing “tahini (ground sesame)” as an ingredient, there simply has not been a breach of express warranty as it is precisely that ingredient that allegedly gave rise to the plaintiff’s allergic reaction. To the extent that the plaintiff relies solely on the lid which only reflects “red pepper hummus,” again, the definition of hummus itself includes sesame. The defendants have also established their entitlement to dismissal of the plaintiff’s claims sounding in breach of express warranty.

“To successfully assert a claim under General Business Law § 349 (h)..., ‘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, 941 [2012], quoting *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n 1 [2002]). “Whether a representation or an omission, the test is whether the allegedly deceptive practice is ‘likely to mislead a reasonable consumer acting reasonably under the circumstances’ ” (*Wilner v Allstate Ins. Co.*, 71 AD3d 155, 165 [2d Dept 2010], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1996]; citing *Andre Strishak & Assoc., P.C. v Hewlett Packard Co.*, 300 AD2d 609 [2d Dept 2002]). “ ‘Such a test . . . may be determined as a matter of law or fact (as individual cases require)’ ” (*Wilner v Allstate Ins. Co.*, 71 AD3d at 165, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 26). “[I]n resolving the reasonable consumer inquiry, one must consider the entire context of the label (emphasis added)” (*In re Frito-Lay N. Am., Inc. All Nat. Litig.*, , 2013 WL 4647512, at *16 [EDNY Aug. 29, 2013], citing *Freeman v Time, Inc.*, 68 F3d 285, 289 [9th Cir 1995] [“considering both large and small print in ad in dismissing consumer protection claims”]; *Verzani v Costco Wholesale Corp.*, 2010 WL 3911499 at *2 [SDNY 2010], *affd* 432 Fed Appx 29 [2d Cir 2011] [“considering entire label on a food tray, which listed each item on the tray and its relative weight, in dismissing case alleging that the food tray’s ‘net weight’ label referred only to one item in the tray, not all of the items on the tray”]; *Hairston v S. Beach Beverage Co., Inc.*, 2012 WL 1893818, at *4 [CD Cal 2012] [“Plaintiff’s selective interpretation of individual words or phrases from a product’s labeling cannot support a CLRA, FAL, or UCL claim”]).

The plaintiff alleges that the defendants’ failure to indicate that the hummus contained sesame on the lid was misleading. Once again, any such finding would be in dereliction of the federal law. Furthermore, the entire label must be considered in determining whether the label is misleading in examining the claim under the General Business Law - not select portions. The label clearly indicated that the hummus contained sesame. The definition of hummus includes sesame and sesame is listed the ingredients.

Furthermore, the plaintiff's claim under Section 349 of the General Business Law is also without merit because that statute makes it a complete defense to any claim under that statute "if the act or practice complies with the rules and regulations and the statutes administered by the federal trade commission or any official department, division, commission or agency of the United States" as those rules are interpreted by them (General Business Law § 349 [d]). Again, the defendants' product's label complied with the applicable Federal regulations.

As for plaintiff's claims based upon the glyphosate contained in the hummus, assuming *arguendo* that it is not preempted, "[i]t would be nearly impossible to produce a processed food with no trace of any synthetic molecule" (*Axon v Citrus World, Inc.*, 354 F Supp 3d 170, 183 [EDNY 2018], *aff'd sub nom. Axon v Florida's Nat. Growers, Inc.*, 813 Fed Appx 701 [2d Cir 2020], quoting *In re Gen. Mills Glyphosate Litig.*, 2017 WL 2983877 at *1 [D Minn 2017]). "Given the widespread use of herbicides, the court finds it 'implausible that a reasonable consumer would believe that a product labeled ["red pepper humus"] could not contain a trace amount of glyphosate that is far below the amount' deemed tolerable by the FDA" (*Axon v Citrus World, Inc.*, 354 F Supp 3d at 184, quoting *In re Gen. Mills Glyphosate Litig.*, 2017 WL 2983877, at *5). This court agrees with these holdings and concludes that any reasonable consumer would understand that any product containing chickpeas would contain a trace amount of glyphosate which is far below the federal limitations. The court notes that the plaintiff has not pled and cannot prove that the amount of glyphosate in the hummus was material, i.e., that it posed a threat to one who consumed it.

"Where there is no likelihood of future harm, there is no standing to seek an injunction" (*Berni v Barilla S.p.A.*, 964 F3d 141, 149 [2d Cir 2020]; see also, *Rivera v Navient Sols., LLC*, (*LJL*), 2020 WL 4895698, at *14 [SDNY 2020]). That is "[w]here "there is not real, immediate, and imminent threat of continued injury, ... [p]laintiff cannot obtain injunctive relief" (*Kennedy v Mondelez Glob. LLC*, 2020 WL 4006197 at *5 [EDNY July 10, 2020], citing *Lugones v Pete & Gerry's Organic, LLC*, 440 FSupp3d 226, 238 [SDNY 2020]; *Izquierdo v. Mondelez Int'l, Inc.*, 2016 WL 6459832, at *5 [SDNY 2016]). The plaintiff's claim for injunctive relief suffers from the absence of any allegations that there is a possibility of future injury to him from the defendants' product.

Finally, " 'punitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives' " (*Moskowitz v Masliansky*, 198 AD3d 637, 640-41 [2d Dept 2021], quoting *Gravitt v Newman*, 114 AD2d 1000, 1002 [3d Dept 2014]; citing *Thomas v Farrago*, 154 AD3d 896, 898 [2d Dept 2017], *lv dismissed* 30 NY3d 1093 [2018] *Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307 [2d Dept 1998]; *Spinosa v Weinstein*, 168 AD2d 32, 42 [2d Dept 1991]). Here, not only are there no grounds for damages on which an award of punitive damages could be predicated, the plaintiff's allegations against the defendants amount to nothing more than allegations of mere negligence and do not rise to the level of moral culpability necessary to support a claim for punitive damages. The defendants' motion for an order dismissing the claim for punitive damages is granted and that claim is dismissed.

In opposition, the plaintiff asks this court to refuse to rely on the EIR report on the grounds that it is unknown what its referral to “label” indicates. However, 21 CFR 1.3 (“Definitions”) defines “label” (see supra). That comprehensive definition of label indicates that the entire labeling of the defendants’ product was considered in rendering the EIR report. In fact, nothing the plaintiff cites or relies on overrides the fact that the FDA has found sesame to be an ingredient which needn’t even be specifically identified in a product. Again, it may be indicated as a “spice.” And the defendants have demonstrated that the amount of glyphosate in their product is acceptable under the Federal standards.

The plaintiff’s reliance on 21 CFR 101.18 (b) is misplaced. He alleges that the lid’s label only indicated that the product contained “hummus/chickpea spread.” Actually, the lid label did not include “chickpea spread.” And, once again, “hummus” is defined by Merriam Webster dictionary as “a paste of pureed chickpeas *usually mixed with sesame oil or sesame paste* (emphasis added).” Therefore, “hummus” is not an ingredient, per se, and in fact neither of the two traditional ingredients of hummus appear on the lid’s label. Plaintiff’s reliance on the “prominent labeling” regulations also fails as 21 CFR § 101.15 applies to words, statements or other information “required by or under authority of this chapter to appear on the label or labeling” which does not include sesame or glyphosate.

The plaintiff relies on various studies which identify sesame as an allergen and glyphosate to be dangerous on the grounds that the FDA is “slow” and “does not speak exclusively for science.” The few publications relied on by the plaintiff which indicate that a number of organizations have found sesame to be a significant allergen and glyphosate to be dangerous have not been shown to be of sufficient reliability as to be considered here under the Frye standard. In addition, they hardly contain data which meets the level required under New York State law. The FDA is the federal agency charged with the task of labeling food and the plaintiff’s representation that the FDA, the CDC and the scientific community consider “sesame to be a common hazardous allergen” is simply not supported by any evidence whatsoever.

The plaintiff also relies on *Holmes v Grumman Allied Indus.* (103 AD2d 909, 910 [3d Dept 1984]), in which the court, citing *Kaempfe v Lehn & Fink Prods. Corp.* (21 AD2d at 201), held that “knowledge or constructive notice of *unreasonable danger* to users may cause a duty of warning to be imposed (emphasis added).” The court did not discuss the application of federal law in that case, rendering it easily distinguished from the case extant. And, in contrast to the facts here where the plaintiff was indeed informed of the product’s contents, there is no indication in *Holmes* that that was the case. Furthermore, there has been no evidence presented which establishes any basis for finding that sesame or glyphosate pose an “*unreasonable danger*,” let alone that the defendants had knowledge or constructive notice of such.

The plaintiff has failed to establish the existence of an issue of fact with respect to any of his claims.

Finally, in view of the ultimate holding on the merits in this case, the plaintiff’s motion for an extension of time to serve Strauss Group, Ltd., and an alternate method of service is denied.

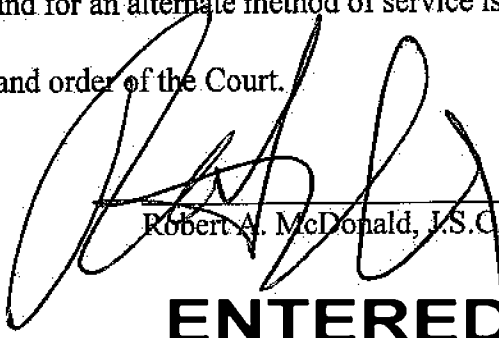
These motions are hereby determined as follows:

The defendants' motion (seq. no. 001) for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the complaint against them in its entirety is granted; and, *the complaint is dismissed against all of the defendants*. Although rendered moot, that part of the defendants' application that seeks an order pursuant to CPLR 306-b, 311 and 3211 (a) (8) dismissing the complaint against Strauss Group, Ltd., based upon the lack of personal jurisdiction or setting this matter down for a traverse hearing is denied.

The plaintiff's motion (seq. no. 002) for an order pursuant to CPLR 311 extending its time to effect service on Strauss Group, Ltd., and for an alternate method of service is denied.

This shall constitute the decision and order of the Court.

Dated: April 11, 2022



Robert A. McDonald, J.S.C.

ENTERED

Apr 19 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE