Willis v Foot Locker Retail, Inc.
2024 NY Slip Op 34492(U)
December 19, 2024
Supreme Court, Kings County
Docket Number: Index No. 519154/23
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 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 19th day of December 2024.

P R E S E N T:

HON. CAROLYN E. WADE,
Justice.

---X

TERETTA WILLIS, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

Index No. 519154/23

FOOT LOCKER RETAIL, INC.,
Defendant.

MS#3

---X

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	16-17
Opposing Affidavits (Affirmations)	25
Affidavits/ Affirmations in Reply	29

Upon the foregoing papers in this proposed class action for allegedly deceptive marketing and sale of products to consumers, defendant Foot Locker Retail, Inc. moves (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3211 (a) (3) and (a) (7),[1] dismissing the amended complaint.

[1] The Court notes that the notice of motion seeks dismissal pursuant to CPLR 3211 (a) generally, however, it is evident from the affirmation in support of the motion and memorandum of law that defendant seeks dismissal pursuant to subsections (a)(3) and (a)(7) of CPLR 3211.

Background

Plaintiff Teretta Willis, individually and on behalf of all others similarly situated, (plaintiff) instituted this proposed class action against defendant Foot Locker Retail, Inc., (defendant or Foot Locker) by the filing of a summons and complaint on July 3, 2023, which was subsequently amended with the filing of an amended complaint on February 5, 2024. Plaintiff alleges that the defendant engaged in "deceptive pricing and sales tactics to sell footwear and apparel" at both its brick-and-mortar stores and on its website, which allegedly includes misleading labeling and marketing of most of the available products as "on Sale" (NYSCEF Doc No. 13, Am. Comp. ¶¶ 9-10). Plaintiff specifically alleges the following:

> "Inside its stores, most of the available items appear to be marked as on "Sale," shown through the red tags attached to the sneakers. When a potential purchaser looks closer, they will see that the "Sale" tags are bereft of any information about any previous, "non-sale" price, making it impossible to know if what they are buying is a bona fide bargain. [T]hese "sales" extend beyond footwear to apparel, inducing purchasers to "Take 30 [or 50]% OFF. The high percentage of products on sale, with no information provided about what the "sale" price means, extends beyond Foot Locker's brick-and-mortar stores to its website. (*Id.* at ¶¶ 10-13)
>
> Beyond misleading pricing, the Foot Locker website employs the "urgency" dark pattern, using design features that make prospective customers believe they need to buy quickly because there may not be enough remaining if they do not." (*Id.* at ¶ 22).

Plaintiff's amended complaint also alleges that Consumers Checkbook, a nonprofit consumer organization, reviewed defendant's labeling and marketing practices by tracking 30 representative items over the course of at least five weeks and determined that 29 (or

89%) of defendant's products were continuously on sale (*id.* at ¶¶ 14-15). According to the amended complaint, Consumers Checkbook concluded that "discounted prices were their actual prices, because there was seldom a period when such discounts were not applied" (*id.* at ¶ 20).

Plaintiff alleges that she and similar consumers of defendant's products suffered pecuniary harm because they paid a price premium for defendant's products due to their reliance on defendant's misleading labeling and marketing. In this regard, plaintiff alleges that if she had known that the products that she purchased were regularly sold at prices she was led to believe were discounted, she would not have made those purchases, or would have paid less for such items (*id.* at ¶ 43). The amended complaint asserts a cause of action for Foot Locker's violation of General Business Law (GBL) §§ 349 and 350, seeking monetary damages as well as reasonable attorneys' fees.

Defendant's Dismissal Motion

In support of its motion, defendant contends that plaintiff has not pleaded a cognizable injury to support standing to pursue her GBL §§ 349 and 350 claims. It argues that, while plaintiff names two products she allegedly purchased, the complaint is devoid of specific information including: (1) the date plaintiff purchased the products; (2) the purchase price of the products; or (3) how the products were advertised. Defendant also contends that plaintiff's allegations that, as a consumer, she "derives satisfaction from getting a bargain," and in hindsight, wishes "she would not have made [the] purchases" or that she "would have paid less" (Am. Comp. ¶¶ 39-40, 43) are speculative and do not rise to the level of an injury in fact sufficient for standing. According to defendant, plaintiff's

conclusory allegation that the products she purchased were "worth less than what she paid" is without merit, as she fails to demonstrate that plaintiff paid a price premium for the products.

Next, defendant asserts that plaintiff's amended complaint should be dismissed for failure to state GBL §§ 349 and 350 claims, as plaintiff has not alleged sufficient facts to plead that Foot Locker's conduct was deceptive or materially misleading. Defendant notes that plaintiff has not alleged that Foot Locker's advertised prices are false, or that its advertised "sale" was the best or lowest price in the industry. According to defendant, information regarding the price of the product was available to plaintiff at the time of purchase. Accordingly, defendant maintains that plaintiff's allegations are based on plaintiff's subjective beliefs of what a sale price should be, which is insufficient for GBL §§ 349 and 350 claims.

Finally, defendant contends that plaintiff's amended complaint should be dismissed solely because plaintiff has failed to allege sufficient facts to show that she was injured by reason of defendant's conduct. According to defendant, the amended complaint does not plausibly allege a "price premium" injury that plaintiff overpaid for the items. Instead, defendant asserts that plaintiff simply alleges that the products she purchased were simply "worth less than what she paid." Defendant asserts that, in the absence of facts related to the value of the products plaintiff purchased, or how the products fell short of any representations, the amended complaint only reflects plaintiff's subjective disappointment which is insufficient to allege an injury under GBL §§ 349 and 350.

Plaintiff's Opposition

Plaintiff, in opposition, submits a memorandum of law arguing that she has sufficiently alleged a particularized injury in fact sufficient to confer standing, as the amended complaint alleges that plaintiff overpaid for defendant's products resulting in a financial loss. Specifically, plaintiff alleges that, between July 2020 and the date the complaint was filed, she purchased the following at defendant's store: (1) a Nike Jordan Jumpman Classics Warmup Jacket in black, metallic and gold, with a suggested retail price of $90.00, for an amount less than the suggested retail price (closer to $65.00) (Am. Comp. ¶¶ 29-31); and (2) Nike Air Force 1 '07 sneakers in Low Voltage Purple, with a suggested retail price of $90.00, for an amount less than the suggested retail price (Am. Comp. ¶¶ 35-36). In addition, the amended complaint states that plaintiff's recollection is consistent with publicly available pricing information of both items which were listed as being subject to a "sale price" on defendant's website (Am. Comp. ¶¶ 32, 37). Plaintiff alleges that she suffered an injury, as she paid more than she otherwise would have paid for products marketed by defendant as subject to price discounts, relying on defendant's representations and omissions that the prices plaintiff paid were *not* everyday prices (Am. Comp. ¶4). According to plaintiff, she suffered damages in: (1) the prices she paid for the products she bought, and (2) the price premium paid for the products she bought, which is the difference between what plaintiff paid for items she purchased based on the misleading sales practices and how much those items would have been sold for without defendant's false and misleading representations and omissions, as identified above (Am. Comp. ¶ 62).

Further, plaintiff asserts that the amended complaint sufficiently alleges injury under GBL §§ 349 and 350 because it alleges that plaintiff paid a price premium, or more than she would have otherwise been willing to pay, based on defendant's misleading and deceptive representations that the products she purchased were "on Sale." Plaintiff asserts that, on a motion to dismiss, the Court is required to accept as true plaintiff's price premium and benefit of the bargain allegations, that she "had no reason to expect the items she bought were not listed at higher prices for reasonable periods of time" (Am. Comp. ¶ 42). According to plaintiff, Foot Locker's deceptive pricing advertising constitutes a material misrepresentation to plaintiff and the class members, to whom deep discount pricing is important to them, and that they interpretated "Sale" or strikethrough pricing as meaning actual deep discounts on identical products (Am. Comp. ¶¶ 41, 56-58). In addition, plaintiff argues that the question of whether a reasonable consumer would likely be deceived by Foot Locker's pricing advertising is a misleading question of fact that cannot be resolved on a motion to dismiss.

Discussion

In moving to dismiss a complaint pursuant to CPLR § 3211 (a) (3) for lack of standing, the burden is on the defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law and "[t]o defeat a defendant's motion to dismiss, the plaintiff has no burden of establishing its standing as a matter of law but must merely raise a question of fact as to the issue" (*Wilmington Sav. Fund Soc'y, FSB v Matamoro*, 200 AD3d 79, 89-90 [2d Dept 2021]). On a motion to dismiss, "[g]eneral factual allegations of injury resulting from the defendant's conduct may suffice," as there is a presumption that "general

allegations embrace those specific facts that are necessary to support the claim" (*see Duchimaza v Niagara Bottling, LLC*, 619 F.Supp.3d 395, 407 [SDNY 2022], quoting *Lujan v Defenders of Wildlife*, 504 US. 555, 561 [1992]). In determining a motion to dismiss the complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The complaint must be "liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true" (*Pacific Carlton Dev. Corp. v 752 Pac.*, 62 AD3d 677, 679 [1994]; *see also Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012], *as amended* [2013]).

Plaintiff's GBL §§ 349 and 350 Claims

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (GBL § 349 [a]), while GBL § 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (GBL § 350). The standard for recovery under GBL § 350, albeit specific to false advertising, is otherwise identical to § 349 and its essential elements are the same (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n.1 [2002]; *Orlander v Staples Inc.*, 802 F.3d 289, 300 [2d Cir. 2005]). To assert a claim under GBL § 349 or 350, plaintiff must allege that: (1) a defendant engaged in consumer-oriented conduct; (2) that is misleading in a material way; and (3) that plaintiff suffered

injury as a result of the allegedly deceptive act (*see Yellow Book Sales & Distribution Co. v Hillside Van Lines, Inc.*, 98 AD3d 663, 664-665 [2012]; *see also Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]).

For the purposes of this motion, it is beyond dispute that the amended complaint alleges consumer-oriented conduct as it challenges defendant's labeling and marketing of its products for sale to consumers. Consequently, the Court need only assess the second and third elements of plaintiff's GBL §§ 349 and 350 claims – whether defendant engaged in a material deceptive act and whether plaintiff was injured as a result.

A required element of both GBL §§ 349 and 350 causes of action is a materially misleading act or advertisement resulting in injury to a consumer (*see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 176 [2021]; *Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002]). The test for both a deceptive act or deceptive advertisement is whether the act or advertisement is "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Andre Strishak & Assocs., P.C.*, 300 AD2d at 609, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26); *see also Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP*, 37 NY3d at 178). While a court may make the determination of whether an act or omission is misleading as a matter of law (*Oswego*, 85 NY2d at 26; *accord Fink v Time Warner Cable*, 714 F.3d 739, 741 [2d Cir. 2103]), the determination is usually a question of fact (*see Quinn v Walgreen Co.*, 958 F. Supp.2d 533, 543 [SDNY 2013]).

Here, plaintiff alleges that Foot Locker's price advertising, which includes using "Sale," strikethrough or "discounted" on its products is materially misleading because the advertising is designed to give the impression that consumers are receiving discounts on these items (Am. Comp. ¶ 20). Plaintiff also alleges that nowhere on defendant's price tags or in any of its price advertising was it disclosed to consumers, including plaintiff, how defendant arrived at the "Sale" or strikethrough prices or how long the sale would last (Am. Comp. ¶ 11-13, 18). As a result, plaintiff alleges that defendant's sales labeling is likely to mislead a reasonable customer to believe they were purchasing products at a discount and receiving the benefit of the bargain. The Court finds that these allegations, if accepted as true, support a plausible claim of materially misleading conduct under GBL §§ 349 and 350. Accordingly, the Court cannot find, as a matter of law, that no reasonable consumer could be misled by defendant's sales labeling and advertisements of its products.

Next, to establish a claim under GBL §§ 349 and 350, plaintiff must claim that she suffered actual injury as a direct result of defendant's materially misleading conduct (*see Stuntman v Chemical Bank*, 95 NY2d 24, 29 [2000]). The Court of Appeals has determined that deceptive conduct cannot be pled "as both act and injury," and plaintiff is required to demonstrate pecuniary or actual harm apart from the deceptive conduct (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 [1999]). While New York courts do not apply a "rigid 'price premium' doctrine[,]" in cases involving the purchase of consumer goods, as here, the Second Circuit for the United States Court of Appeals explained that "the issue of 'price premium' [i]s relevant because it show[s] that plaintiff paid more than they would have for the good but for the deceptive practices of the defendant-seller" (*Orlander v*

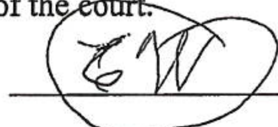
Staples, Inc., 802 F3d 289, 302 [2d Cir. 2015]; *see also Eidelman v Sun Products Corp.*, No. 21-1046-CV, 2022 WL 1929250 [2d Cir. June 6, 2022]).

Here, the Court finds that plaintiff's loss of benefit of the bargain and price premium allegations constitute a cognizable injury based on defendant's allegedly deceptive practices. The complaint sufficiently alleges pecuniary harm as plaintiff alleges that she would not have paid the premium price she paid for products absent defendant's allegedly deceptive "on Sale" labeling and marketing of the products (Am. Comp. ¶¶ 41, 43). Plaintiff's allegations plausibly allege that she was denied the benefit of the bargain as she believed she was receiving items that were discounted (Am. Comp. ¶ 58) (*see Orlander*, 802 F3d at 301). Moreover, the amended complaint sufficiently alleges that plaintiff suffered damages in the form of a price premium because she paid a higher price for defendant's products than she otherwise would have absent defendant's allegedly deceptive labelling and marketing. Under New York's liberal pleading rules, the complaint adequately states a legally cognizable claim for relief under GBL §§ 349 and 350, and thus, at this juncture, dismissal is denied.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit. Accordingly, it is

ORDERED that defendant Foot Locker's motion (mot. seq. three) seeking to dismiss plaintiff's complaint is **denied**.

This constitutes the Decision and Order of the court.



J. S. C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

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