

**Jack v Stop & Shop Supermarket Co. LLC**

2025 NY Slip Op 30580(U)

January 16, 2025

Supreme Court, Bronx County

Docket Number: Index No. 818611/2023E

Judge: Kim Adair Wilson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK: Part IA-12

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GEORGE JACK, individually and on behalf of all,  
others similarly situated,  
Plaintiff,

**DECISION AND ORDER**  
**Index No. 818611/2023E**  
**Motion Seq. #: 002**

**-against-**

**HON. KIM ADAIR WILSON**  
**J.S.C.**

THE STOP & SHOP SUPERMARKET COMPANY  
LLC,

Defendant.

-----X  
**Kim Adair Wilson, J.:**

“NOTICE OF MOTION” (NYSCEF Doc 5), dated and filed April 30, 2024, respectively, and signed by Torsten M. Kracht, Esq. (Hunton Andrews Kurth LLP), counsel for defendant, The Stop & Shop Supermarket Company LLC (Stop & Shop), seeking an Order “dismissing the Complaint with prejudice as to Stop & Shop for failure to state a cause of action against Stop & Shop pursuant to CPLR 3211(a)(7)” is decided as set forth below.

Plaintiff George Jack’s Class Action Complaint seeks monetary damages for the defendant Stop & Shop’s alleged price manipulation characterized, in sum, by the artificial inflation of a good’s price as the pretext for a subsequent “sale” whereat the inflated price is reduced to the actual market price, and is intentionally misrepresented as a discount to create an illusory bargain, in violation of New York General Business Law (“GBL”) §§ 349 and 350; and that the foregoing manipulations contributed to the defendant’s unjust enrichment at plaintiff’s expense. Plaintiff alleges that he made purchases on and between October 2020 and October 2023 that were affected by defendant’s misleading pricing scheme, and seeks to represent “all persons in New York who purchases items at Stop & Shop in New York advertised as on sale and/or discounted where the ‘former’ prices were not bona fide prices and bought more of such items than they otherwise would have during the statutes of limitations for each cause of action alleged.”

Defendant/movant now moves pre-answer to dismiss plaintiff’s complaint, pursuant to CPLR 3211(a) (7). Movant contends that plaintiff has failed to allege an injury cognizable under GBL §§ 349 and 350, in that plaintiff fails to allege with specificity which products he purchased, or that he did not receive the full value of his purchases. In fact, movant avers, plaintiff does not allege that he purchased the allegedly mis-priced products, nor that he observed the putative deals presented in the complaint and therefore cannot adequately plead causation, or more specifically, that plaintiff was deceived by defendant’s misrepresentations and that he suffered an identifiable injury as a result. Movant insists that

a proper pleading under GBL §§ 349 and 350 must allege more than mere deception and must demonstrate that the alleged deception actually caused plaintiff's injury, such as that the price of the product was inflated as a result of defendant's deception, or that the use of the product adversely affected plaintiff's health. Additionally, because plaintiff does not allege that he did not receive the goods he purchased, or that the items were worth less than the price he paid, and therefore cannot sustain his claim for unjust enrichment.

In opposition, plaintiff contends that, because the sale goods did not return to their former price after the sale concluded but was instead sold at a price below the former price, that the former price was therefore artificially inflated to induce bargain-hunters to purchase the items at the fictitious sale price. Plaintiff also contends that the allegations demonstrate a causal connection between the defendant's misrepresentations and the plaintiff's injury, which he describes, in substance, as the purchases made in reliance on defendant's false representations of the magnitude of the discount obtained. Plaintiff also asserts that his unjust enrichment claim is not duplicative of his GBL claim, and that the defendant should not be permitted to benefit from its misleading representations. Further, plaintiff argues that he may assert an unjust enrichment claim where a bona fide dispute exists as to which theory may succeed, and thus the plaintiff should be permitted to proceed on both theories.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the trial court must decide whether the pleading, within its four corners, states a cause of action. *See Qualified Personal Residence Trust of Doris Rosen Margetti*, 137 A.D.3d 965 (2d Dept. 2016). Although conclusory allegations are insufficient to state a cause of action (*Caniglia v. Chicago Tribute New York News Syndicate, Inc.*, 204 A.D.2d 233 [1st Dept. 1994]), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Dee v. Rakower*, 112 A.D.3d 204 (2nd Dept. 2013). Although the facts pleaded are presumed to be true and are accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration." *See WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, (1st Dept. 1992) (granting motion to dismiss). To determine the sufficiency of a pleading, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *See Leon v. Martinez, supra* at 88. If the complaint and affidavits permit some reasonable chance, even if small, that plaintiff might prevail on its cause of action, the pleading should not be dismissed under 3211(a)(7). *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976).

We turn first to plaintiff's cause of action asserting that defendant engaged in business practices violative of GBL §§ 349 and 350. GBL §§ 349 and 350 are consumer

protection statutes that prohibit deceptive acts and practices and false advertising, respectively, “in the conduct of any business, trade or commerce or in the furnishing of any service in this state” and, inter alia, afford consumers a private right of action to redress such misconduct. *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 183 (1st Dept. 2001), *aff’d as modified sub nom. Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). While proof of justifiable reliance is not required, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm. *See Oswego Laborers’ Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1st Dept. 1995). Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances. *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000) [quotations omitted]. Importantly, the United States District Court, Southern District of New York has held that “[i]n the consumer goods context, an allegation of a defendant’s deception alone does not suffice to plead injury, because a plaintiff may have received the benefit of the bargain despite the alleged misrepresentation.” *Ham v. Lenovo (United States) Inc.*, 664 F. Supp. 3d 562, 580 (S.D.N.Y. 2023). Moreover, a plaintiff’s subsequent regret about their purchasing decisions, while understandable, is simply not actionable. *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 8 (1st Dept. 1998), *aff’d*, 94 N.Y.2d 43 (1999).

Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that movant has demonstrated that plaintiff has not stated a valid cause of action under GBL §§ 349 and 350. While plaintiff’s allegations purport to show that defendant engaged in deceptive consumer-oriented acts or practices, plaintiff does not allege that the advertisements actually cited in the complaint caused plaintiff to engage in a consumer transaction to his detriment, nor does plaintiff allege any actual injury as result of those allegedly deceptive practices. With respect to the latter, plaintiff fails to allege any defect in the goods purchased nor any adverse effects from their consumption, nor even that he paid above market value in their purchase. The allegations indicate that plaintiff, perceiving that he was obtaining a substantial bargain, purchased more than he intended, or perhaps even than he would have otherwise, but that he nonetheless obtained the benefit of his purchased goods. Plaintiff’s failure to assert an actual injury is a defect fatal to his cause of action under GBL §§ 349 and 350. Therefore, that branch of movant’s motion seeking to dismiss plaintiff’s cause of action alleging violation of GBL §§ 349 and 350 is **GRANTED**.

We turn now to that branch of the movant’s motion seeking dismissal of plaintiff’s cause of action for unjust enrichment. In order to adequately plead unjust enrichment, “the plaintiff must allege “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012). An unjust

enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), dismissing plaintiffs' unjust enrichment claim as duplicative of their GBL § 349 claim). Here, plaintiff substantively alleges that defendant was unjustly enriched by its deceptive consumer-oriented practices that induced plaintiff to make excessive purchases at an artificial sale price, and that permitting defendant to retain those profits would be "contrary to equity and fair dealing" (NYSCEF Doc 2 at ¶97). *Ergo*, it is apparent that plaintiff's unjust enrichment claim is contingent on the same facts, elements and putative injuries as its GBL claims, and is also impaired by the same defects that render the latter nonviable. Consequently, that branch of movant's motion seeking dismissal of plaintiff's cause of action for unjust enrichment is **GRANTED**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

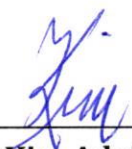
Accordingly, movant's motion to dismiss plaintiff's complaint is **GRANTED in the entirety**, as stated herein. Further it is hereby

**ORDERED that plaintiff's Complaint is hereby dismissed; and it is further**

**ORDERED that the movant is directed to serve a copy of this Decision and Order with Notice of Entry, upon plaintiff within thirty (30) days of entry, and to file proof of service with the court.**

This constitutes the Decision and Order of this Court.

Dated January 16, 2025  
Bronx, New York

  
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Hon. Kim Adair Wilson, J.S.C.