

Harrison v Upfield US Inc.

2025 NY Slip Op 33581(U)

September 9, 2025

Supreme Court, Bronx County

Docket Number: Index No. 816472/2024E

Judge: Fidel E. Gomez

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
LYNN HARRISON, ANNIE LAMBERT, and NICOLE SHEPPARD, individually and on behalf of all others similarly situated,

Plaintiff,

Index No. **816472/2024E**

Hon. **FIDEL E. GOMEZ**
Justice

- against -

UPFIELD US INC.,

Defendants.

-----X
The following papers numbered 1 to 1, read on this Motion noticed on 5/21/2025, and duly submitted as no. 2 on the Motion Calendar of 5/21/2025.

| | <u>PAPERS NUMBERED</u> | |
|--|------------------------|--|
| Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | | |
| Replying Affidavit and Exhibits | | |
| Notice of Cross-Motion - Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee’s Report - Minutes | | |
| Filed Papers- Order Appointing Temporary Receiver | | |
| Memorandum of Law | | |

Defendant’s motion is decided in accordance with the Decision and Order annexed hereto.

Dated:

9/9/25

Hon

FIDEL E. GOMEZ, JSC

1. CHECK ONE

2. MOTION/CROSS-MOTION IS

3. CHECK IF APPROPRIATE.

CASE DISPOSED

GRANTED (MOTION)

GRANTED IN PART

SETTLE ORDER

SUBMIT ORDER

DO NOT POST

NON-FINAL DISPOSITION

DENIED (MOTION)

OTHER

FIDUCIARY APPOINTMENT

REFEREE APPOINTMENT

NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
**LYNN HARRISON, ANNIE LAMBERT, and
NICOLE SHEPPARD, individually and on behalf
of all others similarly situated,**

Plaintiffs,

-against-

DECISION AND ORDER

Index No. 816472/2024E

UPFIELD US INC.,

Defendant.

-----X

In the instant action, defendant moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the complaint, and for attorneys’ fees and costs.

For the reasons set forth hereinafter, defendant’s motion is granted, in part.

BACKGROUND

The first amended complaint (complaint) alleges a single cause of action for violation of New York General Business Law (GBL) §§ 349 (deceptive business practices) and 350 (false advertising).¹ Specifically, the complaint alleges, *inter alia*, as follows: Defendant Upfield US Inc. (Upfield) manufactures, labels, markets, packages, distributes, and/or sells vegetable oil spread, described as “with Olive Oil,” in large capital letters, beneath two ripe olives and olive leaves, highlighting its “Simple Ingredients,” with “Good Fats from Plant-Based Oils,” that “Contains Omega-3 AAA,” under the “I Can’t Believe it’s not Butter!” brand (the Product) in fifteen ounce tubs.² The front of the tub also contains the language “45% Vegetable Oil Spread.” Despite expecting olive oil would be the exclusive or predominant vegetable oil ingredient, or at

¹The action is brought as a putative class action, the proposed class consisting of only citizens of New York who purchased the subject “I Can’t Believe its’ not Butter!” product, with the labeling identified here, in New York, for consumption and/or use in New York, during the statutes of limitations.

²Photographs of the tubs’ packaging are embedded within the complaint.

least present in a significant amount, the ingredient list, in fine print on the back of the packaging reveals the most predominant plant-based oils are soybean oil, palm kernel and palm oil, with olive oil listed after these traditional vegetable oils, present in the smallest amounts. Olive oil costs more than soybean oil and palm oil. As a result of the false and misleading representations and omissions, the Product is sold at a premium price, approximately \$3.78 per fifteen ounces. The price is higher than the Product would be sold for if it were represented in a non-misleading way. Plaintiffs bought the Product, with the labeling/packaging identified in the complaint, at or around the above-referenced price. Plaintiff Lynn Harrison (Harrison) purchased the Product between September 2021 and September 2024, at stores in New York. Plaintiffs Anne Lambert (Lambert) and Nicole Sheppard (Sheppard) purchased the Product between September 2021 and March 2025, at stores in New York. Plaintiffs paid more than they would have had they known olive oil was not the exclusive or predominant vegetable oil ingredient, nor present in a significant amount.

With respect to their GBL §§ 349 and 350 cause of action, the complaint alleges, *inter alia*: The packaging and labeling of the Product violated the GBL because the representations caused purchasers to expect olive oil would be the exclusive or predominate vegetable oil ingredient, or at least present in a significant amount. Defendant's false and deceptive representations and omissions with respect to the Product's contents were material in that they were likely to influence consumer purchasing decisions. Plaintiffs paid more for the Product than they otherwise would have paid based on the misleading representations and/or omissions. As a result of defendant's misrepresentations and omissions, plaintiffs were injured, and suffered economic or financial damages, by payment of a price premium for the Product, typically between five and sixty cents.

Standard of Review

In deciding a motion to dismiss pursuant to CPLR § 3211, a court must “accept the facts alleged in the complaint is true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The pleading is to be afforded a liberal

construction (*id.* at 87). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 23 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). "Where . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullman v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). On a motion made pursuant to CPLR § 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party (*Sokol v Leader*, 74 AD3d 1180, 1181 [2nd Dept 2010]). While "CPLR § 3211 allows a plaintiff to submit affidavits, [] it does not oblige him to do so on penalty of dismissal" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*id.* at 636). Thus, a plaintiff "will not be penalized because he has not made an evidentiary showing in support of his complaint" (*Rovello* at 635).

However, a court may consider evidentiary material submitted by a defendant, and if it does so, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer* at 275). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [1976] quoting *Rovello* at 636). Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a

fact at all and unless it can be said that no significant dispute exists regarding it” (*Guggenheimer* at 275).

Discussion

In support of the motion, defendant contends that: (1) the Product label is not misleading because it does not promise a predominant - or any particular - amount of olive oil; (2) the composition of the Product is clearly and accurately disclosed on the Product label; and (3) plaintiffs have not adequately alleged actual injury.

In opposition, plaintiffs contend that: (1) deception is plausible and the ingredient list on the back label is insufficient to dispel deception and (2) plaintiffs adequately allege injury because they paid more for the Product than they would have had they known that the amount of olive oil was de minimis.

Violation of GBL §§ 349 and 350

Under GBL § 349, deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York State are unlawful. GBL § 350 provides that false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York State is unlawful. Advertising is false if it is misleading in a material respect (GBL § 350-a[1]; *Karlin v IVF America, Inc.*, 93 NY2d 282, 290 [1999]). These consumer protection statutes prohibit deceptive acts and practices that misrepresent the nature or quality of products or services (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 176 [2021]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 146 [2d Dept 769]). To state a cause of action under either section, a plaintiff must allege that: (1) defendant’s conduct was consumer-oriented; (2) defendant’s act or practice was deceptive or misleading in a material way; and (3) plaintiff suffered an injury as a result of the deception (*Plavin v Group Health Inc.*, 35 NY3d 1,10 [2020]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n1 [2002] [“The standard of recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section 349.”]; *Denenberg v Rosen*, 71 AD3d 187, 195 [1st Dept 2010] [same]). A plaintiff claiming the benefit of GBL §§ 349 and 350 must demonstrate that the acts or practices have a broader impact on consumers at

large (*Plavin* at 10; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]; *North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 13 [2d Dept 2012]). The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Oswego Laborers' Local 214 Pension Fund* at 25; *Gomez-Jiminez v New York Law School*, 103 AD3d 13, 16 [1st Dept 2012]). The threshold test is whether the alleged acts are consumer-oriented in the sense that they potentially affect similarly situated consumers (*Oswego Laborers' Local 214 Pension Fund* at 26-27). Also, whether a representation or omission is a deceptive act, practice or advertisement depends on the likelihood that it will mislead a reasonable consumer acting reasonably under the circumstances (*Oswego Laborers' Local 214 Pension Fund* at 26; *Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 603 [1st Dept 2017]; *Gomez-Jiminez* at 16; *Andre Strishak & Associates, P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002]). What is objectively reasonable depends on the facts and context of the alleged misrepresentations and may be determined as a matter of law or fact (as individual cases require)" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP* at 178). Significantly, GBL §§ 349 and 350 are "focused on the seller's deception and its subsequent impact on consumer decision-making, not on the consumer's ultimate use of a product" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP* at 177).

Here, defendant does not contend that the alleged conduct is not consumer-oriented. In any event, the allegations that plaintiffs purchased the Product at stores in New York is sufficient to demonstrate, at the pleading stage, that defendant's conduct was consumer-oriented. However, contrary to plaintiffs' contention, the Court finds the Product's labeling/packaging is neither deceptive nor misleading. Indeed, unlike a label declaring that the product is made entirely or predominantly with olive oil, the phrase "with olive oil" does not promise anything about the amount of olive oil present in the Product. It could thus reasonably be interpreted to mean any amount of olive oil. Significantly, the front label states "45% vegetable oil" rather than "45% olive oil." This further decreases the likelihood that a reasonable consumer will believe that the Product is made predominantly with olive oil, as use of the general term

“vegetable oil” implies that other kinds of vegetable oil are also present. Any doubt as to the relative amount of olive oil present is eliminated by reading the back label, which clearly evinces that olive oil is present in a lesser quantity than each of the other vegetable oils, i.e., soybean oil, palm kernel oil and palm oil, as it appears last in the list of vegetable oils. As plaintiffs acknowledge, it is common knowledge that ingredients are listed in descending order of quantity on food packaging labels. Thus, it is clear that from reading the back label that olive oil is one ingredient within the “45% vegetable oil,” but not a predominant one.

Nor have plaintiffs sufficiently alleged that they suffered any injury as a result of defendants alleged deceptive conduct. Plaintiffs claim that they paid more for the Product than they would have paid if it were represented in a non-misleading way. Plaintiffs allege that the amount of damages equals the difference between what plaintiffs paid based on the misleading representations and how much the Product “would have been sold for” without the misleading representations. While the complaint alleges that this difference is typically between five and sixty cents, plaintiffs proffer no basis for this conclusion. Rather, plaintiffs allege in conclusory fashion that they paid a price premium for the Product.

Based on the foregoing, the complaint fails to state a cause of action for violations of GBL §§ 349 and 350.

Fees and Costs

While not indicated in defendant’s Notice of Motion, in its Memorandum of Law, defendant contends that it is entitled to recover the fees and costs they incurred in the course of preparing two motions to dismiss. First, defendant urges the Court to award it \$10,000³ under CPLR §8303-a because the case lacked merit when it was filed and to stop plaintiffs’ attorney’s “pattern of repeatedly filing frivolous cases” against them. However, CPLR § 8303-a sanctions are available in actions to recover damages for personal injury, injury to property or wrongful death (CPLR § 8303-a; *Pilatich v Town of New Baltimore*, 188 AD3d 1386, 1387 [3d Dept 2020]; *Mitchell v Herald Co.*, 137 AD2d 213,218 [4th Dept 1988].) In the instant action,

³Defendant asserts that it has incurred “much more than \$10,000 in attorneys’ fees and costs to defend this action to date.”

plaintiffs seek to recover damages solely for economic injury. As such, defendant's application for sanctions pursuant to CPLR § 8303-a is denied.

Second, defendant contends that it "should be awarded additional fees and costs" from plaintiffs for failing to respond to defendant's first motion to dismiss "and then driving up litigation costs further" by "forcing [defendant] to move to dismiss an amended pleading."⁴ This, in itself, is not a sufficient basis for an award of legal fees and costs.

Accordingly, it is hereby

ORDERED that the complaint be dismissed with prejudice. It is further

ORDERED that defendant shall serve a copy of this Decision and Order upon plaintiffs, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
September 9, 2025

Hon.


FIDEL E. GOMEZ, J.S.C.

⁴Plaintiff did not submit opposition to defendant's first motion to dismiss and, instead, filed an amended complaint.