

Gay v Walmart, Inc.

2026 NY Slip Op 30086(U)

January 13, 2026

Supreme Court, Westchester County

Docket Number: Index No. 74988/2024

Judge: Diane M. Clerkin

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
DOLORES GAY, individually and on behalf of
all others similarly situated,

Plaintiff,

-against-

WALMART, INC.,

Defendant.

-----X
CLERKIN, J.

DECISION AND ORDER

Index No.: 74988/2024

Seq. No. 1

Motion Date: Nov. 21, 2025

The following papers were considered on the motion by defendant, Walmart, Inc. (“Walmart”), for an order, pursuant to CPLR 3211 (a) (3) and (a) (7), dismissing the complaint.

<u>Papers</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion and Memorandum of Law in Support	8-9
Memorandum of Law in Opposition	13
Memorandum of Law in Reply	14

BACKGROUND

Plaintiff Dolores Gay brings this putative class action against Walmart for violations of General Business Law §§ 349 and 350 with respect to Walmart’s Great Value Macaroni & Cheese Original Microwavable Cups product. According to plaintiff, the statement on the product box, “Made with Real Cheddar Cheese,” misleads consumers into believing that real cheddar cheese is “the exclusive or predominant, non-macaroni ingredient and/or component, or at least present in a significant, absolute and/or relative amount, compared to any non-cheese ingredients” (NYSCEF Doc. No. 2 at ¶ 19), when in fact, the predominant components of the cheddar cheese sauce are

whey and maltodextrin, which are lower cost, lower quality cheese substitutes, and not real cheddar cheese. Plaintiff alleges that as a result of Walmart's false and misleading representations, "plaintiff paid more for the product than she would have" (NYSCEF Doc. No. 2 at ¶ 92).

In support of its pre-answer motion to dismiss, Walmart argues that the complaint must be dismissed because a plaintiff alleging deceptive acts and practices under the General Business Law has no cognizable injury where, as here, the complained of product comes with an unrestricted money-back guarantee. Walmart argues that the complaint must also be dismissed because it fails to plausibly allege how the factually true statement "Made with Real Cheddar Cheese" could mislead a reasonable consumer into believing that the product contains any particular amount of cheddar cheese. Walmart further contends that plaintiff's allegation that the product's packaging violates federal and state regulations cannot form a basis for liability under the General Business Law because the statute is concerned with whether a defendant's actions are likely to mislead a reasonable consumer, and not whether the packaging violates any government regulations. Lastly, Walmart argues that plaintiff's sole cause of action must be dismissed because it is preempted by federal labeling regulations promulgated by the U.S. Food and Drug Administration ("FDA").

In opposition, plaintiff argues that the complaint adequately states a claim under General Business Law §§ 349 and 350 by alleging the label, "Made with Real Cheddar Cheese," is false and misleading because it suggests that real cheddar cheese is the predominant non-macaroni ingredient, when the cheese sauce actually includes more whey, maltodextrin and palm oil than real cheddar cheese. Plaintiff acknowledges that the "Made with Real Cheddar Cheese" statement is factually accurate, but argues that the literal truth of the statement is not an absolute defense to this action. Indeed, plaintiff argues, various courts have held that true statements that create a

materially misleading impression may nevertheless deceive consumers, in violation of the General Business Law. Plaintiff further contends that the product's ingredient label is also not a defense to this action because, although it accurately lists cheddar cheese in its order of predominance, the label is insufficiently prominent or clear to negate the overall misleading impression that real cheddar cheese is the product's exclusive or predominate, non-macaroni ingredient.

Plaintiff further contends that Walmart improperly relies on federal case law to support its motion for dismissal. Plaintiff argues that federal courts incorrectly apply the "reasonable-consumer" standard to General Business Law claims, rather than the "unthinking-consumer" standard set forth by the New York Court of Appeals, which is binding on this Court. At the same time, plaintiff urges the Court to follow the Second Circuit's reasoning in *Mantikas v Kellogg Co.*, 910 F3d 633 [2d Cir 2018]. In *Mantikas*, the court found that plaintiffs adequately alleged that "whole grain" and "made with whole grain" labels on packaging of crackers were false or misleading because the crackers' primary grain content was enriched flour, not whole grain flour, and a reasonable consumer could not be expected to consult the nutritional facts on the side of the packaging to correct the misleading information in large bold type font on the front of the product. Lastly, plaintiff argues that her state law claims are not preempted by federal law, nor does Walmart's money-back guarantee render plaintiff without a cognizable injury to pursue this action.

DISCUSSION

I. *Standing*

A party may move to dismiss one or more causes of action pursuant to CPLR 3211 (a) (3) on grounds that the party asserting the cause of action lacks the legal capacity to sue. While not explicitly referenced within the statute, a plaintiff's lack of standing also falls within the scope of

CPLR 3211 (a) (3) (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 89 [2d Dept 2021]). On a pre-answer motion to dismiss for lack of standing, “the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied” (*Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). The plaintiff need do no more than raise a question of fact as to its standing in order to defeat the motion (*id.*).

Here, Walmart’s Great Value Macaroni & Cheese Original Microwavable Cups come with an unrestricted money-back guarantee permitting consumers to return the package for a replacement or their money back (NYSCEF Doc. No. 2 at ¶ 19). Walmart has demonstrated, prima facie, that the existence of such a guarantee means there is no injury under the General Business Law (*see, e.g., Preira v Bancorp Bank*, 885 F Supp 2d 672 [SD NY 2012] [finding that consumer in a putative class action failed to allege she suffered an injury within the meaning of General Business Law § 349 where the defendant offered consumers the option, without restrictions, of sending in the complained of product, which was a pre-paid gift card, to claim any unused balance]). In opposition, plaintiff relies on *Mountz v Global Vision Products, Inc.*, 3 Misc 3d 171 [Sup Ct, NY County 2003]) to argue that a consumer may still suffer actual damages, even where the defendant offers a money-back guarantee. However, *Mountz* is distinguishable because the money-back guarantee contained restrictions, unlike Walmart’s money-back guarantee, which is an unrestricted refund policy that would fully compensate plaintiff at any time for her alleged injury (*i.e.*, overpaying for the product) (*see Preira*, 885 F Supp 2d at 678 [distinguishing *Mountz* and noting the absence of any cases in which a court found a consumer sustained actual damages in the face of an unrestricted money-back guarantee]). Accordingly, the Court agrees that

plaintiff's allegations are insufficient to plead an injury, and therefore, plaintiff has no standing to commence this action.

II. *Failure to State a Cause of Action*

Even assuming plaintiff does have the requisite standing, the complaint must nevertheless be dismissed, on the merits, for failure to state a cause of action. Dismissal for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). In determining a motion pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Bd. of Managers of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1378 [2d Dept 2019]).

General Business Law § 349 prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” General Business Law § 350, relatedly, prohibits “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service.” To state a claim under either section “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]). An act or practice is deceptive if it is “likely to mislead a reasonable consumer acting reasonably under the circumstances” (*Oswego Laborers’*

Local 214 Pension Fund v Mar. Midland Bank, N.A., 85 NY2d 20, 26 [1995]).¹ “What is objectively reasonable depends on the facts and context of the alleged misrepresentations” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 178 [2021]) and “under certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception” (*Fink v Time Warner Cable*, 714 F3d 739, 742 [2d Cir 2013]). The question of whether a defendant’s consumer-oriented conduct is likely to mislead a reasonable consumer “may be determined as a matter of law or fact (as individual cases require)” (*Oswego*, 85 NY2d at 26).

Because the Court is unaware of any New York State Appellate Court cases addressing whether the statement “Made with Real [ingredient]” is misleading under the General Business Law, the Court turns to federal precedent and an analogous lower court decision and finds them persuasive (*see, e.g., Raphael v Schwan’s Consumer Brands, Inc.*, 2025 NY Slip Op 52089 (U) [Sup Ct, Kings County 2025] [plaintiff failed to allege facts sufficient to demonstrate that the label, “Made with Real Cream Cheese,” located on a frozen box of whipped cheesecake was likely to mislead a reasonable consumer to believe that a certain quantity of cream cheese was present in the product]; *Davis v Schwan’s Consumer Brands, Inc.*, 742 F Supp 3d 400, 408 [SD NY 2024] [dismissing, as unreasonable, plaintiff’s claim that the statement on a frozen apple pie box that it was “Made with Real Butter” misled consumers to believe there was more butter in the pie crust

¹ Contrary to plaintiff’s contention, the “unthinking-consumer” standard previously adopted by the Court of Appeals is no longer applicable to General Business Law §§ 349 and 350 claims (*City of New York v Exxon Mobil Corp.*, 86 Misc 3d 679, 695-96 [Sup Ct, NY County 2025] [discussing the Court of Appeals’ retreat from the subjective “unthinking-consumer” standard originally set forth in *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

than any other shortening]; *Kennedy v Mondelez Glob. LLC*, 2020 WL 4006197, *12 [ED NY July 10, 2020, No. 19-CV-302 (ENV/SJB) [finding that a reasonable consumer would not be misled into believing that the statement on a graham cracker box that it was “Made with Real Honey,” which was factually true, meant that honey predominates over other sweeteners]]).

In applying the reasoning of these decisions, the Court finds that plaintiff’s complaint must be dismissed pursuant to CPLR 3211 (a) (7) because no reasonable consumer would understand the factually true statement “Made with Real Cheddar Cheese” to mean that real cheddar cheese is the product’s exclusive or predominate, non-macaroni ingredient, let alone the unspecified greater amount of cheddar cheese expected by plaintiff. In addition, the product’s ingredient list clearly and accurately shows consumers the order of prominence of cheddar cheese in the product. The *Mantikas* case, on which plaintiff relies, does not warrant a different result. The Second Circuit has made clear that in *Mantikas*, the court “determined that contextual information on the reverse of the product’s packaging could not overcome clearly *inaccurate* factual representations on the front labeling” (*Foster v Whole Foods Mkt. Group, Inc.*, 2023 WL 8520270, *2 [2d Cir Dec. 8, 2023, No. 23-285-CV], citing *Mantikas*, 910 F3d at 638-639 [emphasis added]). That is not the case here. The statement at issue, “Made with Real Cheddar Cheese,” is not an inaccurate factual statement, and when combined with the additional information in the product’s ingredient list, defeats plaintiff’s claim of deception.

The Court has considered the parties remaining contentions and finds them to be without merit or rendered moot by this decision and order.

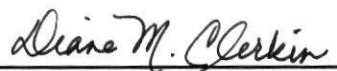
Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint pursuant to CPLR 3211 (a) (3) and (a) (7) is granted; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order with Notice of Entry thereof within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
January 13, 2026



HON. DIANE M. CLERKIN
Justice of the Supreme Court

To: All Parties via NYSCEF

