Chico v Blue Diamond Growers
2026 NY Slip Op 30234(U)
January 16, 2026
Supreme Court, Bronx County
Docket Number: Index No. 817619/2024E
Judge: Fidel E. Gomez
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

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

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WALTER CHICO, MARC YANCEY, PHYLLIS THOMPSON, LAMARR GOLSTON, AND JENNIFER MADOLE, ***individually and on behalf of all others similarly situated*****,**

Index No. **817619/2024E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

BLUE DIAMOND GROWERS,

Defendant.

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The following papers numbered 1 to 1, read on this Motion noticed on 09/30/2025, and duly submitted as no. 2 on the Motion Calendar of 09/30/2025.

	PAPERS NUMBERED	
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:
1/16/26

Hon.
FIDEL E. GOMEZ, JSC

1.CHECK ONE	☐ CASE DISPOSED	X NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS	☐ GRANTED (MOTION)	☐ DENIED (MOTION)
	X GRANTED IN PART	☐ OTHER
3. CHECK IF APPROPRIATE.	☐ SETTLE ORDER	☐ FIDUCIARYAPPOINTMENT
	☐ SUBMIT ORDER	☐ REFEREE APPOINTMENT
	☐ DO NOT POST	☐ NEXT APPEARANCE DATE:

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

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WALTER CHICO, MARC YANCEY, PHYLLIS THOMPSON, LAMARR GOLSTON, AND JENNIFER MADOLE,
***individually and on behalf of all others similarly situated*,**

Plaintiffs,

-against-

DECISION AND ORDER

Index No. 817619/2024E

BLUE DIAMOND GROWERS,

Defendant.

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In the instant action, defendant moves for an Order, pursuant to CPLR § 3211(a)(2)[1] and (a)(7), dismissing the complaint.

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).[2] Specifically, the complaint alleges,[3] *inter alia,* as follows: Defendant Blue

[1]Pursuant to CPLR § 3211(a)(2), an action may be dismissed on the ground that "the court has not jurisdiction of the subject matter of the cause of action. However, in its memorandum of law in support of the motion, defendant avers that the motion to dismiss is based on lack of standing and failure to state a cause of action, not the lack of subject matter jurisdiction. Thus, the motion is treated as one for dismissal on the foregoing grounds.

[2]The action is brought as a putative class action, the proposed class consisting of all citizens of New York who purchased the subject Original Almond Nut-Thins product, in boxes of 4.25 ounces, under the Blue Diamond Almonds brand for personal consumption and/or use in New York, during the statutes of limitations.

[3]Photos depicting the front of the Product's box and one of the sides of the box are embedded within the complaint. The complaint does not include a photo of the side of the box containing the "Nutrition Facts" label.

Diamond Growers (BDG) sells original variety Almond Nut-Thin crackers, in boxes 7.25 inches in height, 6.625 inches wide, and 2.25 inches deep, with a net weight of 4.25 ounces (the Product). Despite an expectation the box's contents would be reasonably related to its size, the Product is misbranded because its container is so made, formed and/or filled as to be misleading. This is because its opaque, cardboard container does not allow the consumer to fully view its contents which would reveal, upon information and belief, nonfunctional slack-fill in the form of almost sixty percent. The box holds an interior foil bag, which holds the crackers. As a result of the false and misleading representations, packaging, and/or omissions, the Product is sold at a premium price of approximately $3.38, which is higher than the Product would be sold for, if it were represented in a non-misleading way. Plaintiffs read, saw and/or relied upon the packaging and labeling, including the oversized box, and/or the omission of a fill line, to mean the level of fill would be greater than 41 percent, and/or that there would be a greater amount of crackers in the box. Plaintiffs paid more for the Product than they would have had they known that the package would have close to 60 percent empty space and/or there would not be a greater amount of crackers in the box, as they would have paid less. Plaintiff Walter Chico (Chico) purchased the Product between October 2021 and October 2024, from retail stores in New York. The remaining named plaintiffs purchase the Product between October 2021 and February 2025, from retail stores in New York.

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 packaging, labeling, level of fill, representations, omissions, designs, markings caused purchasers to expect the level of fill would be greater than 41 percent and/or that there would be more crackers in the box, which was unfair and deceptive to consumers. Plaintiffs paid more for the Product than they otherwise would have paid based on the misleading labeling, packaging, representations, statements, omissions and/or marketing. As a result of defendant's misrepresentations and omissions, plaintiffs were injured and/or were caused to suffer economic or financial damages by payment of a price premium, or higher relative price, for the Product "typically on the order of" between five and sixty cents per unit, a "small fraction or percentage of the total price."

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) plaintiffs fail to plausibly allege nonfunction slack-fill; (2) the Product label is not misleading;[4] (2) plaintiffs have not adequately alleged actual injury; and (3) plaintiffs have not pleaded causation.

In opposition, plaintiffs contend that: (1) deception is plausible and the nutritional fact panel is insufficient to dispel deception; and (2) plaintiffs adequately allege injury because they paid more for the Product than they would have but for defendant's misrepresentations

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

[4]Defendant submits photos of the Product, including the "Nutrition Facts' label.

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, defendants do 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. Significantly, the front of the box indicates a net weight for

the Product of 4.25 ounces, and the side label indicates that the box contains "about 4 servings" and that the serving size is 19 crackers. A reasonable consumer would read the label disclosing the weight of the Product and the quantity of crackers inside the box. Notably, no plaintiff contends that they purchased a box of the Product with substantially less than approximately 76 crackers, as indicated on the side label of the box.

Nor have plaintiffs sufficiently alleged that they suffered any actual injury as a result of defendant's alleged deceptive practices. The complaint alleges that as a result of defendant's misrepresentations and omissions, plaintiffs "were injured and/or were caused to suffer economic or financial damages by payment of a price premium, or higher relative price, for the Product "typically on the order of" between five and sixty cents per unit. Yet, the complaint is bereft of any specific allegations concerning this "higher relative price," such as allegations concerning the identity and cost of similar cracker products whose boxes have a higher fill level.

Based on the foregoing, the complaint fails to state a cause of action for violations of GBL §§ 349 and 350. As such, defendant's motion for dismissal of the complaint pursuant to CPLR § 3211(a)(7), is granted.[5]

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
January 16, 2026

Hon. RIDEL E. GOMEZ, J.S.C.

[5]Given this finding, the Court need not, and does not, consider defendant's remaining arguments.